Supreme Court, U.S.
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No. ——

# IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY,
*Petitioner,*

v.

CHARLES A. THOMAS, *et al.*,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR WRIT OF CERTIORARI

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November 7, 1994

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## QUESTION PRESENTED

Whether, in actions brought under the federal Worker Adjustment and Retraining Notification Act, the applicable limitations period should be drawn from Section 10(b) of the National Labor Relations Act rather than state law.

## PARTIES TO PROCEEDINGS BELOW AND RULE 29.1 STATEMENT

### Petitioner/Defendant Below

North Star Steel Company ("North Star") is a wholly-owned subsidiary of Cargill, Inc., which is a privately-held corporation. None of Cargill's shareholders is itself a publicly-traded entity.

### Respondents/Plaintiffs Below

Respondents are Charles A. Thomas; Darren Boop; Robert W. Bower; William D. Bridge; James Clingan; Neil B. Housner; Jonathan L. Noaker; Wayne D. Orner; Gerald W. Ranck; Harold E. Van Sickle, Jr.; Richard A. Winter; and Eugene L. Witmer, Sr.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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North Star Steel Company ("North Star") respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the court of appeals in this case.

## OPINIONS BELOW

The Opinion of the court of appeals (App. 1a-16a) is reported at 32 F.3d 53. The decision of the district court is reported at 838 F. Supp. 970. (App. 17a-25a) A further decision of the district court (App. 26a-28a) is not reported.

## JURISDICTION

The court of appeals entered its judgment on August 10, 1994. (App. A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 *et seq.*, is set forth in Appendix D at 29a to 37a. Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is set forth in the same appendix at 38a.

## STATEMENT OF THE CASE

Respondents, former salaried employees of North Star, filed their Complaint on October 22, 1992 in the United States District Court for the Middle District of Pennsylvania. They alleged they were entitled to damages under the WARN Act because they were laid off twenty months earlier without receiving advance notice. On April 1, 1993, North Star moved for summary judgment on grounds that Respondents' action was time-barred by the six-month statute of limitations set forth in Section 10(b) of the NLRA. The district court agreed and on May 25, 1993 granted North Star summary judgment. However, on August 10, 1994, the Third Circuit reversed this decision, declaring, in accordance with the view of the Second Circuit, that state law controls the applicable WARN limitations period.

Two weeks later, on August 24, 1994, a conflict among the circuits developed when the Fifth Circuit, under virtually identical factual circumstances, held that the Section 10(b) limitations period governed the timeliness of WARN actions, and expressly rejected the reasoning of its sister appellate courts. On October 31, 1994, the Sixth Circuit also adopted the Section 10(b) limitations period for WARN. Thus, the courts of appeals which have addressed this issue are now evenly divided on this critical question.

### I. The North Star Plant Closing And Previous Litigation.

On February 25, 1991, North Star ceased production and laid off approximately 270 employees at its Milton, Pennsylvania steel plant. After suffering a WARN-

defined "employment loss" later that year, the United Steelworkers of America ("USWA"), a union representing approximately 250 employees at the Milton plant, filed a complaint in federal court on September 9, 1991 alleging that North Star had violated the WARN Act by failing to give the Union sixty days advance notice of the closing. On April 9, 1992, the district court granted USWA's motion for summary judgment on liability, holding that the layoff constituted a "plant closing" subject to WARN. In a separate order dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steelworkers v. North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992), *aff'd in relevant part*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

Respondents, twelve salaried employees at the Milton plant, were unrepresented by USWA and, thus, unaffected by the *United Steelworkers* litigation. However, on October 22, 1992—more than six months after the district court's determination of a violation and more than 20 months after the layoff occurred—Respondents filed this action seeking to collect their own WARN damages against North Star.

**II. The Proceedings Below.**

On April 1, 1993, North Star moved for summary judgment on grounds that the Respondents' action was time-barred. Noting that the WARN Act itself contained no statute of limitations, North Star argued that the court should "borrow" the limitations period set forth in Section 10(b) of the NLRA. In response, the Respondents argued that their complaint was timely filed because the court instead should borrow a longer statute of limitations from state law, such as the three-year limitations period contained in the Pennsylvania Wage Payment and Collection law.

On May 25, 1993, the district court granted North Star's motion for summary judgment. Applying *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the court determined that the NLRA provided a closer analogy to WARN than any available state statute and that the federal policies at stake and the practicalities of litigation made it more appropriate to borrow the NLRA limitations period.

On appeal, Respondents' claim was consolidated with the appeal of Crown Cork & Seal Co., an employer that had been unsuccessful in asserting the Section 10(b) limitations period in another WARN action in the Eastern District of Pennsylvania. *United Steelworkers v. Crown Cork & Seal Co.*, 833 F. Supp. 467 (E.D. Pa. 1993), *aff'd*, 32 F.3d 53 (3d Cir. 1994). In reversing the judgment for North Star and affirming the judgment against Crown Cork the court of appeals held that the most closely analogous state statute of limitations, rather than the six-month statute of limitations set forth in the NLRA, should govern WARN actions. Although it acknowledged that "none of the possible state laws provide [sic] perfect analogies to WARN," that "courts have looked to NLRA cases in interpreting WARN," and "that there are some definitional overlaps" between the two federal statutes, it nonetheless interpreted *DelCostello* to require application of a state limitations period. (App. 10a). The Third Circuit reached this decision despite being unwilling —or perhaps unable—to decide which of a multitude of possible state limitations periods would now actually control WARN actions in Pennsylvania.

## REASONS FOR GRANTING THE PETITION

The Third Circuit's decision in this case, which is in accord with *United Paperworkers International Union Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993), conflicts directly with the Fifth Circuit's subsequent holding in *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994), and with the Sixth Circuit's even more recent decision in *United Mine Workers v. Peabody Coal Co.*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994). At the district court level, conflicting decisions as to the WARN limitations period are also proliferating rapidly, and the need for instruction from this Court is acute. Judicial resources are too scarce, and the financial burden on litigants too large, for the Court to allow this important issue to fester unabated in the lower courts. Moreover, the decisions of the Second and Third Circuits are erroneous, and the need to clarify and redirect the convoluted law of limitations "borrowing" is important.

### I. THE THIRD CIRCUIT'S REFUSAL TO BORROW THE SECTION 10(b) LIMITATIONS PERIOD FOR WARN ACTIONS CONFLICTS WITH THE RULINGS OF THE FIFTH AND SIXTH CIRCUITS AND AGGRAVATES A GROWING SPLIT IN AUTHORITY AMONG THE DISTRICT COURTS.

Under WARN, employers having at least one hundred employees are subject to civil liability if they fail to give their employees at least sixty days written notice of a statutorily-defined "plant closing" or "mass layoff." 29 U.S.C. §§ 2101-2109. However, "[a]s is often the case in federal civil law," *DelCostello*, 462 U.S. at 158, the WARN statute does not contain an express limitations period.

Initially, district courts confronted with WARN limitations questions analogized the facts to "hybrid" Section 301/duty of fair representation claims and "borrowed"

the six-month statute of limitations contained in Section 10(b) of the NLRA. *See Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185, 188-92 (E.D.N.Y. 1992), *on reconsideration*, No. CV 92-0449 (ADS), 1993 WL 308138 (E.D.N.Y. Apr. 10, 1993); *Staudt v. Glastron Inc.*, No. SA-92-CA-1174, 1993 WL 85356, at *2 (W.D. Tex. Feb. 23, 1993), *aff'd sub nom. Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *rehearing en banc granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994). Subsequently, at least four other district court rulings also adopted the NLRA's six-month limitations period for WARN actions.[1]

However, shortly after the *United Magazine* and *Staudt* cases were decided, other district courts began to reach different conclusions regarding the appropriate WARN limitations period. Refusing to borrow the Section 10(b) period, these courts instead applied various state statutes of limitations to determine the timeliness of WARN claims.[2]

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[1] *See Halkias v. General Dynamics Corp.*, 825 F. Supp. 123 (N.D. Tex. 1993), *aff'd*, 31 F.3d 224 (5th Cir. 1994), *rehearing en banc granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994); *Cureington v. General Dynamics Corp.*, No. 93-1680 (N.D. Tex. 1993), *aff'd sub nom. Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir. Sept. 22, 1994); *Thomas v. North Star Steel Co.*, 838 F. Supp. 970, 972-75 (M.D. Pa. 1993), *rev'd sub nom. United Steelworkers v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994); *United Mine Workers v. Peabody Coal Co.*, No. 92-0073-0 (CS) (W.D. Ky. June 30, 1993), *aff'd*, No. 93-6020, 1994 WL 590188 (6th Cir. Oct. 31, 1994).

[2] *United Steelworkers v. Crown Cork & Seal Co.*, 833 F. Supp. 467, 467-70 (E.D. Pa. 1993), *aff'd*, 32 F.3d 53 (3d Cir. 1994); *Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Servs., Inc.*, 830 F. Supp. 432, 435-37 (N.D. Ill. 1993); *Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 329-31 (C.D. Cal. 1993) (applying California limitations period after determining that defendant had waived limi-

This division among the district courts as to the proper WARN limitations period has now split the courts of appeals as well. In *Specialty Paperboard*, 999 F.2d at 51, the Second Circuit sided with the district courts that had found WARN not sufficiently analogous to the NLRA to warrant application of the federal limitations period. The same outcome was reached by the Third Circuit in the instant case. (App. A).

However, in *Halkias* and *Peabody Coal*, the Fifth and Sixth Circuits have drawn an opposite conclusion. In *Halkias*, in affirming a series of district court rulings which adopted Section 10(b) as the proper limitations period for WARN, the Fifth Circuit noted "the necessity for a uniform limitations period for WARN claims," and found the NLRA to be "a closer analogy than available state statutes." 31 F.3d at 233, 241 (citing *DelCostello*, 462 F.2d at 171-72). In *Peabody Coal*, the Sixth Circuit also affirmed a district court's application of the Section 10(b) limitations period, finding that "Section 10(b) of the NLRA provides the more analogous limitations provision and better effectuates the policies underlying WARN . . . ." 1994 WL 590188 at *8. In their rulings, the Fifth and Sixth Circuits expressly rejected the holdings and rationale of their sister circuits. *Halkias*, 31 F.3d at 228; *Peabody Coal*, 1994 WL 590188 at *6.

With the district and appellate courts now almost evenly divided, there is no realistic prospect for resolution of this vexing limitations question without a decision by the Court. All future decisions on this issue will simply side with one camp or the other, incrementally shifting the weight of authority in one direction or the other. Furthermore, without a real constituency for the establish-

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tations defense); *Frymire v. Ampex Corp.*, 821 F. Supp. 651, 653-55 (D. Colo. 1993); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 194-97 (E.D. Mich. 1993).

ment of limitations periods, there is little hope that Congress will act to resolve this issue.[3]

Obviously, no benefit can be derived from the continual ad hoc determination of the WARN limitations period in the lower courts. The cost in judicial time and attorneys' fees is too high to permit this constant distraction from the underlying merits of the parties' WARN claims, to say nothing of the courts' need to address other pressing substantive issues. Now that the strengths and weaknesses of each position have been thoughtfully analyzed below, this case presents a timely vehicle for the Court to determine definitively the appropriate WARN limitations period.

## II. RESOLUTION OF THE QUESTION PRESENTED BY THIS PETITION IS VITALLY IMPORTANT.

### A. WARN Needs a Final, Uniform Limitations Period.

The current state of WARN limitations law is entirely unsatisfactory to both litigants and the courts. Unless the court grants certiorari in this case, an incalculable number of hours will be wasted as judges are continually forced to revisit this limitations question—time that obviously would be better dedicated to other matters.

Moreover, in those circuits (such as the Second and Third) that opt for a state limitations period, the work of bench and bar is only beginning. Litigants and judges in these courts will now be forced to spend their time and resources "characterizing" their WARN claims and then

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[3] In 1990 Congress enacted a "fallback" statute of limitations for all civil claims arising under federal legislation passed after December 1, 1990. 28 U.S.C. § 1658. However, despite the recommendation of the Federal Courts Study Committee, Congress was unable, or unwilling, to set limitations periods for the vast array of pre-existing federal statutes, such as WARN, that do not contain them. *See* Kimberly Norwood, *28 U.S.C. § 1658: A Limitation Period With Real Limitations*, 69 Ind. L. J. 477, 503-04 (1994).

analogizing them to each forum state's various causes of actions and statutes of limitations. Because these characterizations will vary from state to state, and even likely from judge to judge, WARN limitations law will be long plagued by uncertainty and confusion—to say nothing of the possibilities for forum shopping. *See Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143, 147 (1987) (concluding that "a uniform statute of limitations [was] required to avoid intolerable 'uncertainty and time-consuming litigation.'") (citation omitted).

The few existing attempts to analogize WARN to state causes of action have demonstrated the overwhelming problems of borrowing state law in this area. For example, while the Second Circuit in *Specialty Paperboard* determined that Vermont's six-year statute of limitations for breach of contract actions should fix the WARN limitations period, another court characterized WARN as most analogous to California's three-year residual limitations statute. *Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc.,* 826 F. Supp. 326, 330 (C.D. Cal. 1993). The Sixth Circuit summarized this growing confusion resulting from state law borrowing as follows:

> The suggestions of possibly analogous limitations periods run the gamut from the catchall limitations period advocated here to those governing contracts or torts. Even the *Specialty Paperboard* and *Wallace* courts, which agreed that state contract limitations periods should apply, did so for divergent reasons. Add to these limitations periods, arguments that can be raised under state unemployment laws, state wage laws, state benefit laws, state plant closing laws, and the opportunities are endless. Thus, selecting a WARN limitations period implicates the same concerns for uniformity present in *Agency Holding Corp.*

*Peabody Coal,* 1994 WL 590188 at *7.

Given the obvious need to end this senseless "characterization" odyssey though state law, and the obvious benefit of having an important federal statute interpreted consistently throughout the nation, Section 10(b) should be adopted as the uniform WARN limitations period. Because the Third Circuit failed to reach this conclusion, Petitioner's certiorari request should be granted.

### B. The Current Limitations Borrowing Doctrine Is Flawed and Should Be Re-examined.

Although the practical need for a final, uniform WARN limitations period alone warrants Supreme Court review, Petitioner submits that this case raises broader questions concerning the overall wisdom of the current limitations borrowing doctrine. That doctrine originated last century, when the federal judiciary under the guise of the Rules of Decision Act began "borrowing" state statutes of limitations whenever Congress failed to provide a limitations period in federal law.[4] *See, e.g., Campbell v. City of Haverhill,* 155 U.S. 610 (1895); *McCluny v. Silliman,* 28 U.S. (3 Pet.) 270 (1830).

In more recent times, the Court has rejected the idea that the Rules of Decision Act formally mandates the imposition of state limitations periods on federal actions. *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 160 n.13 (1983) (rejecting reliance "on a few turn-of-the-century cases suggesting that the Rules of Decision Act compels application of state limitations periods"). Later Court decisions have concurred in this view. *See, e.g., Agency Holding Corp.,* 483 U.S. at 143.

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[4] Rules of Decision Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (now codified with minor changes at 28 U.S.C. § 1652). The Rules of Decision Act then provided: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." *Id.* (footnote omitted).

*See also* Joseph L. Calamari, Note, *The Limited Reach of DelCostello v. International Brotherhood of Teamsters: A Statute of Limitations in LMRDA Title I Actions*, 56 Fordham L. Rev. 227, 245 n.19 (1987) ("Both the majority approach and Justice Scalia's view agree that the Rules of Decision Act does not mandate application of state limitations periods because the Act merely begs the question, authorizing federal courts to use state laws 'in cases where they apply.' ") (citations omitted).

Although reliance on the Rules of Decision Act has been discredited, the practice of using state law to determine unspecified federal limitations periods has not. Without deeper contemplation, the Court has premised its continued borrowing of state limitations periods on the belief that Congress "intends by its silence that we borrow state law." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991) (quoting *Agency Holding Corp.*, 483 U.S. at 147).

However, it now is clear that the Court's rationale, to the extent that it ever held credence, is no longer tenable. In enacting the post-1990 "fallback" statute of limitations, 28 U.S.C. § 1658, *Congress explicitly stated that the continued absorption of state limitations periods for federal statutes is undesirable.* As the Senate noted:

> Statutes of limitations provide a specific time period after the contested event within which a case must be commenced. At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. *Borrowing, while defensible as a decisionable approach in the absence of legislation, appeals* [*sic*] *to lack persuasive support as a matter of policy.*
>
> It also creates several practical problems: It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the

> development of federal doctrine on the suspension of limitations periods.

*See* 136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Biden) (emphasis added).[5]

Congress has not been alone in recognizing the defects in the current limitations borrowing scheme. Indeed, Senator Biden's remarks in the Congressional Record were excerpted from the findings of the 1990 Report of the Federal Courts Study Committee, appointed by Chief Justice Rehnquist. *See* Federal Courts Study Committee, Judicial Conference of the United States, *Report of the Federal Courts Study Committee* (1990). The Study Committee's analysis of *DelCostello* reflects the opinion of many members of the federal bench. *See, e.g., Norris v. Wirtz,* 818 F.2d 1329, 1332 (7th Cir.) ("This is one tottering parapet of a ramshackle edifice. Deciding which features of state periods of limitations to adopt for which federal statutes wastes untold hours.") (citation omitted), *cert. denied,* 484 U.S. 943 (1987).

Recent commentaries have echoed these legislative and judicial doubts about the wisdom of continued state limitations borrowing and have drawn attention to the obvious adverse impact that this current policy has on the equitable administration of federal rights. One commentator summarized these concerns as follows:

> [B]orrowing state time-bars for federal claims causes serious equitable concerns. The state legislatures do not consider the federal interests at issue when they adopt a statute of limitations for a particular state right or category of state rights. Accordingly, the

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[5] The House Report on Section 1658 contains similar language. *See* H. R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870. As commentators have noted, Section 1658 "addresses only a small portion of the borrowing problem because it is limited to new federal statutes." Katherine F. Nelson, *The 1990 Federal "Fallback" Statute Of Limitations: Limitations By Default,* 72 Neb. L. Rev. 454 (1993).

> litigants' interests in the federal right, as well as society's interest in having that right asserted, are not part of the state's balancing process.
>
> * * *
>
> More importantly, borrowing state time-bars leads to the inequitable administration of federal rights. One of the main reasons for enacting a federal law, rather than leaving the problem to the states, is the need for uniformity. When the courts borrow state limitations periods for federal claims, federal rights vary from state to state because each state has its own statutes of limitations.

Nelson, 72 Neb. L. Rev. at 454 (footnotes omitted). *See also* Norwood, 69 Ind. L.J. at 512-13 ("[W]henever a state enjoys the right to decide the longevity of a federal statutory claim, federal interests are automatically frustrated. . . . [A] national cause of action should [not] affect litigants differently depending upon the state in which the plaintiff is able to meet jurisdictional and venue requirements.") (footnotes omitted).

Congress, the Study Committee, and those commentators clearly are correct in drawing attention to the serious flaws in prevailing limitations borrowing practice. Consequently, this case presents an opportunity for the Court to address these perceived shortcomings in the borrowing doctrine and to provide much-needed practical guidance on the WARN limitations question. Given the importance of these issues, and the far-reaching split among the circuits, the Court should grant this petition.

## III. THE DECISION OF THE THIRD CIRCUIT IS ERRONEOUS UNDER EXISTING SUPREME COURT PRECEDENT.

Although Petitioner believes that the Court should review the entire underpinning of its borrowing doctrine, it also believes that the Third Circuit's decision in this case is clearly wrong under existing precedent. This Court

has held repeatedly that a federal limitations period should be borrowed whenever the federal statute provides a "closer analogy" than state law, and where "federal policies" and "the practicalities of litigation" support such a decision. *See DelCostello*, 462 U.S. at 171-72. In the instant case, by overlooking the close analogy between WARN and the NLRA, by ignoring longstanding federal labor policy favoring rapid settlement of employment disputes, and by failing to recognize the danger of inappropriate forum shopping, the Third Circuit has erroneously imposed an unspecified and unsuitable state statute of limitations on WARN proceedings, clearly contrary to existing precedent.

**A. The Framework of the Limitations Debate.**

In overturning the early Rules of Decision Act cases, *DelCostello* substituted a doctrine that continued the preference for absorbing state statutes of limitations, but also acknowledged the propriety of borrowing limitations periods from federal law in appropriate cases. As the Court observed, "[s]tate legislatures do not devise their limitations periods with national interests in mind," and thus "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." *Id.* at 161 (quoting *Occidental Life Ins. Co. v. Equal Employment Opportunity Commission*, 432 U.S. 355, 367 (1977)). Based on these principles, the Court adopted the following standard for federal limitations borrowing:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we [will] not hesitat[e] to turn away from state law.

*DelCostello*, 462 U.S. at 172. The Court described the continued preference for borrowing state statutes as "a sort of fallback rule of thumb." *Id.*, 462 U.S. at 160 n.12.

Utilizing this approach, the *DelCostello* Court applied the NLRA's Section 10(b) limitations period to a "hybrid" Section 301/duty of fair representation claim brought by an employee against both his employer and the union. *Id.* at 165. Subsequently, Section 10(b) also was applied to other federal employment provisions that contained no limitations period. *See, e.g., West v. Conrail,* 481 U.S. 35 (1987) (applying Section 10(b) to Railway Labor Act); *Haggerty v. USAir, Inc.,* 952 F.2d 781 (3d Cir. 1992) (Section 10(b) applied to worker dislocation provisions contained in Airline Deregulation Act); *Aluminum, Brick & Glassworkers Int'l Union Local 674 v. A.P. Green Refractories, Inc.,* 895 F.2d 1053, 1054-55 (5th Cir. 1990) (NLRA period applied to "pure" Section 301 actions under Labor Management Relations Act).

The *DelCostello* federal borrowing rule also has been utilized in civil actions arising from substantive laws outside the labor field. For example, in *Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987), the Court extended the limitations period contained in the Clayton Antitrust Act to civil RICO claims. The Court did so after finding the federal statute to be a "far closer analogy . . . than any state law alternative," noting the "similarities in purpose and structure" between the two federal statutes and recognizing the potential for forum shopping if diverse state limitations periods were applied. *Id.* at 150-52. *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991) (Court found federal limitations period applicable to claims brought under Section 10(b) of the Securities Exchange Act).

### B. The Third Circuit Misapplied *DelCostello* and Its Progeny.

Although much of the above precedent was cited in the Third Circuit's decision, it was largely misapplied. The court of appeals failed to give sufficient weight to the obvious similarities between WARN and the NLRA, failed

to adequately consider the long-standing federal policy favoring quick resolution of labor and employment disputes, and failed to recognize that forum shopping likely will result from the borrowing of multiple state limitations periods.

1. ***WARN is "closely analogous" to the NLRA, and dissimilar from any potential state statute of limitations.***

Although the Third Circuit conceded it should apply Section 10(b)'s six-month limitations period to WARN if the NLRA provided "a closer analogy than available state statutes," the court mistakenly found insufficient similarities between the two federal statutes. (App. 5a). The court compounded its error by not even attempting to analogize WARN to the proposed state statutes of limitations—an exercise possibly abandoned due to the obvious dissimilarities between WARN and those provisions.

a. *WARN and the NLRA impose parallel notification requirements on employers and are structurally similar.*

In *Halkias,* the Fifth Circuit correctly observed that "[t]he NLRA is more than just analogous to WARN; in fact, WARN may be thought of as an outgrowth of the NLRA, because §§ 8(a)(1) and 8(a)(5) of the NLRA . . . have [both] been interpreted to require an employer to notify a union of its decision to close a plant." 31 F.3d at 232 (citing *Penntech Papers, Inc. v. National Labor Relations Bd.*, 706 F.2d 18, 26 (1st Cir.) (NLRA requires employer to provide "timely notice to the union of the decision to close"), *cert. denied,* 464 U.S. 892 (1983)). *See also Dubuque Packing Co.,* 303 N.L.R.B. 386 (1991) (NLRB imposes affirmative duties on employers resulting from decision to close plant), *review granted in part, enforcement granted in part, remanded,* 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed,* 114 S. Ct. 2157 (1994).

In addition to recognizing that both WARN and the NLRA impose requirements upon employers implementing workforce reductions, several courts have commented on the obvious structural similarities between the two federal statutes. " '[T]he family resemblance is undeniable, and indeed there is a substantial overlap' between them." *Halkias*, 31 F.3d at 231 (quoting *DelCostello*, 462 U.S. at 170) (not discussing WARN); *see also Peabody Coal*, 1994 WL 590188 at *3 ("WARN cross-references the NLRA in several respects."); *United Magazine*, 809 F. Supp. at 191 ("the relationship between WARN and the NLRA is strengthened" by linguistic similarities); *accord Thomas v. North Star Steel Co.*, 838 F. Supp. 970, 973 (M.D. Pa. 1993), *rev'd sub nom. United Steelworkers v. Crown Cork & Seal Co.*, 32 F.3d 53 (3d Cir. 1994). In fact, WARN's definitional borrowing from the NLRA occurs in both the actual text of WARN (*see* 29 U.S.C. § 2103(2), providing that NLRA "economic strikers" are not entitled to notice, and 29 U.S.C. § 2101(a)(4), incorporating NLRA definition of "exclusive representative"), and in the Labor Department's implementing regulations. *See, e.g.*, 20 C.F.R. § 639.3(d) (1994) (defining "representative" for WARN purposes by explicit reference to §§ 9(a) and 8(f) of the NLRA); 20 C.F.R. § 639.3(a)(1)(II) (1994) (defining "reasonable expectation of recall"); 20 C.F.R. § 639.3(a)(2) (1994) (defining "independent contractors and subsidiaries" by reference to NLRA case law).

b. *The close relationship between WARN and the NLRA has been recognized by all three branches of government.*

Given the linguistic overlap between WARN and the NLRA, "it is not surprising that, like the Department of Labor, federal courts have [also] turned to NLRA case law in interpreting WARN." *Halkias*, 31 F.3d at 232. Indeed, in *United Steelworkers*, the earlier action against North Star arising from the same factual circumstances,

the court borrowed provisions of the NLRA to determine prejudgment interest and attorney's fees. 809 F. Supp. at 9-10. *See also, e.g., Damron v. Rob Fork Mining Co.*, 739 F. Supp. 341, 344 (E.D. Ky. 1990) (adopting NLRA's "reasonable expectation of recall" standard for determining similar provision in WARN), *aff'd*, 945 F.2d 121 (6th Cir. 1991).

That WARN and the NLRA are substantially entwined is fully documented in the statute's legislative history. During the Senate floor debate on WARN, the ranking minority member of the Senate Labor Committee cautioned that WARN "constitutes a major change in the National Labor Relations Act; so much that it basiacally [sic] . . . amend[s] the [NLRA]." 134 Cong. Rec. 15923, 15924 (1988) (remarks of Senator Hatch). After WARN's enactment, the National Labor Relations Board's General Counsel likewise "predicted substantial interplay between the new law [WARN] . . . and the nation's basic labor law administered by the NLRB." *Halkias*, 31 F.3d at 231-32 (quoting 226 Daily Lab. Rep. (BNA) A-3 (Nov. 23, 1988)).

c. *The Third Circuit erroneously discounted WARN's interrelationship with the NLRA.*

Despite these recognized analogies between the two statutes, the Third Circuit's decision in this case rests on a supposed "lack of similarity between the NLRA and WARN." (App. 10a, n.2). To support this conclusion—remarkable in light of the above-quoted passages—the court described WARN as a "substantive" statute, while maintaining that the NLRA "is concerned with ensuring an equitable bargaining process." (App. 7a) (citation omitted). The Third Circuit also maintained that the statutes were not analogous because, allegedly unlike the NLRA, "[t]he benefits of WARN accrue not only to unionized workers but to all workers alike." (App. 8a).[6]

[6] In *Specialty Paperboard*, the Second Circuit justified its borrowing of Vermont's six-year residual limitations period on similar

However, as the Fifth Circuit noted in *Halkias*, the Third Circuit's reasoning is both factually flawed and premised on a distorted understanding of this Court's precedent. First, as *Halkias* notes, the Third Circuit's attempt to draw a distinction between the "procedural" purpose of the NLRA and the "substantive" nature of WARN is preposterous:

> The purposes of the NLRA are similar to those of WARN. Both regulate labor-management relations: WARN, by requiring notice of impending layoffs and terminations; the NLRA, by facilitating concerted action by employees and governing collective bargaining procedures. Both do so to achieve similar objectives.
>
> * * *
>
> WARN's purpose may be seen as a subset of the NLRA's . . . .

*Id. See also Thomas*, 838 F. Supp. at 973 ("While the specific rights created by [WARN and the NLRA] are different, the policies behind each of the acts are consistent, mutually-reinforcing, and to some extent identical.").

Moreover, even assuming, *arguendo*, that a distinction between the procedural and substantive "purposes" of the statutes could be discerned, the Third Circuit would still be without a sufficient foundation to deny federal borrowing. As the Fifth Circuit observed,

> [a] strict identity of purposes is not a requisite for borrowing a limitations period from one federal statute for use in another. To the contrary, a federal

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grounds. *See Specialty Paperboard*, 999 F.2d at 54-55 ("purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss . . ."; WARN "has only a tangential effect on collective bargaining"). *See also* A. Kent Mayo, Comment, *Warning! This Claim Will Not Self-Destruct In Six Months—The Second Circuit Applies A State Statute Of Limitations To Claims Arising Under The 1988 Worker Adjustment And Retraining Act*, 72 Wash. U. L.Q. 545 (Spring, 1994) (outlining Second Circuit's reasoning).

> statute's limitations period is to be borrowed if, among other things, it provides a closer analogy than available state statutes. If an identity of purposes were required, it would seem that the Court would not have borrowed the Clayton Act's limitations period in establishing a uniform period for RICO.

*Halkias*, 31 F.3d at 233 (citations and quotations omitted). *See also Peabody Coal*, 1994 WL 590188 at *7 ("[D]espite admitted differences between WARN and the NLRA, both are designed to afford protection against job loss—a safeguard that goes to the heart of the employment relationship . . . . '[T]his similarity of purpose' provides the analogy necessary to extend section 10(b) outside the parameters of the NLRA.") (citation omitted).

Similarly in error is the Third Circuit's belief that the NLRA protects only unionized employees. Like WARN, the NLRA clearly applies regardless of whether the affected employees are represented by a union. *See, e.g., National Labor Relations Bd. v. Columbia Univ.*, 541 F.2d 922, 931 (2d Cir. 1976) ("there can be little doubt that the protection afforded to concerted activities under the NLRA applies equally to workers in unionized or in non-unionized firms"); *Hugh H. Wilson Corp. v. National Labor Relations Bd.*, 414 F.2d 1345, 1347 (3d Cir. 1969) ("The mantle of protection of concerted activities . . . extends to both union and non-union employees") (footnotes omitted), *cert. denied*, 397 U.S. 935 (1970).

d. ***The Third Circuit erred by applying Pennsylvania law without finding any analogy between WARN and the applicable state limitations periods.***

In addition to these misinterpretations of statutory intent and court precedent, the Third Court also erred by failing to actually review the state statutes that it declared to be more analogous to WARN than the NLRA. *See DelCostello*, 462 U.S. at 172 (federal law applies if it provides "closer analogy than available state statutes").

Had it attempted such a review, the court no doubt would have found precious little analogy between state law and WARN.

At the appellate level, for example, Respondents recommend no fewer than three alternative state limitations periods: the three-year Pennsylvania Wage Payment and Collection Law, Pa. Stat. Ann. tit. 43, § 260.9a(g) (1992); the six-year state "residual" statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527 (1994); and Pennsylvania's two-year statute for enforcing civil penalties, 42 Pa. Cons. Stat. Ann. § 5524(5) (1994).[7] However, in *Haggerty v. USAir, Inc.*, 952 F.2d 781, 787 (3d Cir. 1992), the Third Circuit rejected the applicability of this same group of limitations periods to a similar claim for damages under the Airline Deregulation Act's worker dislocation provisions. Moreover, in considering a nearly identical array of Texas statutes in the context of WARN, the Fifth Circuit drew the following conclusion equally applicable to the Pennsylvania provisions:

> In sum, canvassing the possible Texas periods reveals none as analogous to WARN as the NLRA. None seeks to accommodate the same, or very similar, interests as WARN, much less govern an action that will frequently overlap with WARN. And, needless to say, none embraces causes of action that share common language with WARN.[8]

*Halkias*, 31 F.3d at 235-36 (footnotes omitted). *See also Peabody Coal*, 1994 WL 590188 at *7 ("The only com-

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[7] For obvious timeliness reasons, Respondents did not proffer the six-month limitations period contained in the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 959(h) (1994).

[8] At the trial court level, where a comparison between the NLRA and potential Pennsylvania limitations periods was made, the court expressly determined that "the framework and goals of the National Labor Relations Act are such that it is more analogous to the Worker Adjustment and Retraining Notification Act than to any state statute of which we are aware." (App. 22a).

monality between WARN and the proffered state statute is that both are pieces of legislation.").

Accordingly, by failing to credit the widely-recognized analogies between WARN and the NLRA and by refusing to even consider the obvious differences between WARN and the available state limitations periods, the Third Circuit has misapplied the precedent of *DelCostello* and *Lampf*.

**2. *The federal interests at stake in the quick resolution of labor disputes support reversal of the Third Circuit's decision.***

As *DelCostello* also holds, courts should "not hesitat[e] to turn away from state law" when "the federal policies at stake and the practicalities of litigation" support the borrowing of a federal limitations period. *Id.*, 462 U.S. at 172. In the instant case, by failing to recognize that the quick resolution of labor disputes is an important federal interest fully applicable to WARN, the Third Circuit clearly compounded its misapplication of the *DelCostello* criteria and committed reversible error.

a. *Congress and the courts repeatedly impose short limitations periods in federal labor matters.*

The speedy resolution of employment disputes is a longstanding cornerstone of federal labor policy. *See Halkias*, 31 F.3d at 238 ("federal labor policy has long favored the rapid settlement of disputes between an employer and an employee"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (discussing strong federal policy in favor of speedy resolution of industrial disputes through arbitration). Where Congress has included limitations periods in federal statutes affecting the employer/employee relationship, the filing deadlines have been consistently short. *See, e.g.*, National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (providing six-month limitations period for fil-

ing unfair labor practice charge before NLRB); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (requiring that an employment discrimination charge be filed with the EEOC within 180 days, or 300 days in a deferral state, of the discriminatory act); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(d) (imposing a similar 180/300 day deadline for filing an age discrimination charge).

Given these statutory pronouncements, it is hardly surprising that the courts have generally "borrowed" comparable—and, therefore, short—federal limitations periods where Congress has not specified a limitations period for employment-related legislation. *See, e.g., DelCostello,* 462 U.S. at 168 (borrowing NLRA's six-month limitations period for "hybrid" Section 301/duty of fair representation claims); *Haggerty,* 952 F.2d at 787 (borrowing Section 10(b) limitations period for worker dislocation provisions of Airline Deregulation Act). *See also Lloyd v. United States Dep't of Labor,* 637 F.2d 1267, 1271 (9th Cir. 1980) (approving one-year limitations period for "retraining, adjustment and relocation" benefits under Federal Trade Act of 1974); *Occidental Chemical Corp. v. International Chem. Workers Union,* 853 F.2d 1310, 1315 (6th Cir. 1988) ("Given the desirability of a rapid resolution of disputes over an arbitrator's award, three months appears to us to be a more appropriate limit than six for an action attacking the validity of an award.").

b. *A short limitations period is equally appropriate for WARN.*

Despite this established preference for short labor limitations periods, the Third Circuit brushed aside its applicability in a single paragraph. Without addressing the existence of other federal employment provisions, the court described the burden of filing an unfair labor practice charge under the NLRA as "minimal," and concluded

simply that "a short statute of limitations could very well frustrate the policies behind WARN." [9]

However, even a cursory examination of pertinent legislative history compels the conclusion that federal policy favoring the quick resolution of employment disputes was intended to be fully applicable to WARN. As the Senate Report indicated, WARN "establishes a comprehensive system for providing *prompt* adjustment and training services to dislocated workers." S. Rep. No. 62, 100th Cong., 1st Sess. 2 (1987) (emphasis added). The Sixth Circuit found it extremely significant that WARN only requires employers to provide laid off workers with 60 days advance notice—a time limitation that also determines the maximum compensatory damages available to employees who do not receive this required notice:

> By implementing a 60-day notice requirement, Congress clearly intended to provide short-term relief not only to affected employees, but to their communities and supporting state agencies as well. This purpose of bridging what would otherwise be a drain on resources would be defeated if not rapidly implemented. A prolonged statute of limitations would do nothing to achieve WARN's aim of starting employees on the road to retraining and reemployment before unemployment becomes a problem.

*Peabody Coal*, 1994 WL 590188 at *7.

The Sixth Circuit's view—that the expediency requirements built into WARN require a short limitations period—has been shared by others. One commentator summarized the underlying Congressional intent as follows:

> [B]ecause WARN was intended to aid displaced workers by giving them time to seek other employ-

[9] The Second Circuit applied a similar rationale in *Specialty Paperboard*, 999 F.2d at 55 (short statute of limitations under NLRA justified by "minimal" burden to pursue unfair labor practice charge).

> ment or training before being terminated, applying a state statute of limitations of several years or more does not serve the policy underlying WARN. Recovering damages several years after being laid off will not help a terminated employee search for immediate training or employment. Rather, these damages would merely ameliorate the employee's general living conditions, a remedy beyond the scope of WARN.

Mayo, 72 Wash. U. L.Q. at 557 (footnotes omitted). *See also Halkias*, 31 F.2d at 239 ("[A]pplication of expansive limitations periods would disserve WARN's most specific objective: the provision of a cushion of time for employees to explore other job opportunities and, if necessary, seek retraining.").

Moreover, the need for a short WARN limitations period is also evident from the typical state of an employer's business following a plant closing or mass layoff. If WARN plaintiffs were allowed several years to bring suit, it likely would be quite difficult, if not impossible, to obtain the requisite records and documentation necessary to determine liability or damages, and increasingly difficult to locate key witnesses and claimants.[10] *See Halkias*, 31 F.3d at 238-39. One need not stretch the imagination to envision the burdens on both the court and the employer in handling a WARN claim asserted several years after the fact—as would likely occur under the lengthy state limitations periods suggested below. Despite the Third Circuit's avoidance of these issues, Congress clearly could not have intended such a deviational result.

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[10] In keeping with the short limitations periods for labor and employment claims, federal law only requires employers to retain payroll records indicating the names of employees and their paid remuneration for a period of three years. 29 C.F.R. § 516.5; 29 C.F.R. § 1627.3(a). If long state limitations periods for WARN actions are permitted—such as the Second Circuit's use of a six-year Vermont period—courts will no doubt be confronted with stale WARN claims where the records needed to answer fundamental liability and damage issues will have been destroyed.

### 3. *The Third Circuit erroneously discounted the danger of forum shopping.*

The Third Circuit was also wrong in dismissing Petitioner's argument that the "practicalities of litigation" favor the borrowing of a uniform federal limitations period. In its appellate brief, Petitioner noted that the WARN Act's expansive jurisdictional provision—which permits an action to be brought not only in "any district in which the violation is alleged to have occurred" but also in any district "in which the employer transacts business"—created an easy mechanism for forum shopping that could only be prevented by the adoption of a uniform federal limitations period. 29 U.S.C. § 2104(a)(5). *See Lampf,* 501 U.S. at 357 (availability of forum shopping weighs heavily in favor of uniform federal standard). Quoting the Second Circuit's analysis in *United Paperworkers Union Local 340 v. Specialty Paperboard, Inc.,* 999 F.2d 51, 56 (2d Cir. 1993), the Third Circuit summarily dismissed this concern by contending that "courts will have little difficulty in determining which state's law to apply and workers will gain few advantages by suing in a court far from the site of injury." 32 F.3d at 60 (footnote omitted).

However, as *Halkias* observed, the Second and Third Circuits' suggestion that this choice of laws problem presents "little difficulty" is fallacious. If, for example, a plaintiff who loses his job in state X were to bring a WARN claim in state Y because state Y has a longer statute of limitations, there is little reason under existing federal law to believe that the court in state Y would impose state X's shorter limitations period. *See Halkias,* 31 F.3d at 237 (in "examining borrowing cases involving a conflict over which state's limitation period should apply, we find a consistent preference for borrowing the forum state's"). *See also Wang Labs., Inc. v. Kagan,* 990 F.2d 1126, 1128 (9th Cir. 1993) ("[i]n an ERISA case, we ordinarily borrow the forum state's statute of limita-

tions"); *Vigman v. Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981) ("[w]hen federal law contains no limitations period applicable to a particular federal cause of action, federal courts are to apply the forum state's limitations period."). Given this precedent and WARN's expansive jurisdictional reach, the Sixth Circuit determined that, "in today's national and international corporate environment," application of varying state limitations periods would result in a "limitless" opportunity for forum shopping. *Peabody Coal,* 1994 WL 590188 at * 6.

Furthermore, an additional danger of forum shopping under WARN will occur when a single employment decision affects employees in different states. The scope of recent WARN litigation indicates that this will be a recurring factual development. In *Halkias,* for example, the WARN plaintiffs could certainly have filed suit in Texas, Oklahoma or Missouri (the three states where the layoff occurred) and—had they considered it—might have selected any other state in which General Dynamics transacts business. *See Halkias,* 31 F.3d at 237 ("Given the possibility for multistate WARN litigation, the issue of which state's limitations period should control might become an issue of time-consuming litigation.").

In light of these dangers, "the federal policies at stake and the practicalities of litigation" clearly point toward the borrowing of a uniform federal statute of limitations for WARN. *Halkias,* 31 F.3d at 229. By failing to give adequate attention to these important considerations, the Third Circuit misconstrued this Court's precedent and committed reversible error.

## CONCLUSION

For each of the foregoing reasons, North Star's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November 7, 1994

# APPENDICES

BEST AVAILABLE COPY

**APPENDIX A**

Filed August 10, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 93-2008 and 93-7613

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC

v.

CROWN CORK & SEAL CO., INC.,
*Appellant* (in No. 93-2008)

CHARLES A. THOMAS; DARREN BOOP; ROBERT W. BOWER; WILLIAM D. BRIDGE; JAMES CLINGAN; NEAL B. HOUSNER; JONATHAN L. NOAKER; WAYNE D. ORNER; GERALD W. RANCK; HAROLD E. VAN SICKLE, JR.; RICHARD A. WINTER; EUGENE L. WITMER, SR.,
*Appellants* (in No. 93-7613)

v.

NORTH STAR STEEL COMPANY

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 92-CV-05968)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 92-CV-01507)

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Argued May 24, 1994

Before: Cowen and Roth, *Circuit Judges*
Ackerman, *District Judge* *

(Filed August 10, 1994)

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## OPINION OF THE COURT

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ACKERMAN, *District Judge.*

These two cases present the following discrete issue: In an action brought pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN"), a statute which, like so many others, fails to explicitly provide a statute of limitations, should we follow the general rule and borrow a state statute of limitations or should we instead opt for the six-month statute of limitations set forth in section 10(b) of the federal National Labor Relations Act. The two cases present the identical issue for review and we will consider both cases in this Opinion.

For the reasons detailed below, we find that for cases arising under WARN, courts should apply the most closely analogous state statute of limitations. Thus, we will reverse the decision in *Thomas v. North Star Steel* and will affirm the decision in *United Steelworkers of America v. Crown Cork & Seal.*

### *Background*

Both of the underlying cases were filed pursuant to WARN, a federal statute which requires companies with one hundred or more employees to provide their workers

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*** Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.**

with a minimum of sixty days written notice before a plant closing or mass layoff.[1] Employers who fail to provide the requisite notice must compensate employees suffering an employment loss for each day of the violation. The statute creates a private civil action for damages in federal court.

On September 9, 1991, the United Steelworkers of America, AFL-CIO-CLC, filed a complaint in federal court alleging that the North Star Steel Company ("North Star") had violated the WARN Act by failing to give the union sixty days advance notice of a February 25, 1991 layoff of about 270 people, at the company's Milton, Pennsylvania plant. Although the suit was filed more than six months after the layoff occurred, North Star did not raise the statute of limitations as a defense. On April 9, 1992, the district court granted the union's motion for summary judgment on liability, holding that the layoff constituted a "plant closing" subject to WARN. In a separate Order, dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steelworkers v. North Star Steel,* 809 F. Supp. 5, 6-7 (M.D. Pa. 1992), *aff'd* 5 F.3d 39 (1993).

Appellants were non-unionized employees of North Star, unrepresented by the union and hence unaffected by the union's successful lawsuit against North Star. They therefore filed a separate action, the instant case, also seeking damages pursuant to WARN. On May 25, 1993, the district court granted North Star's motion for summary judgment, finding that the action was barred under

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[1] The statute defines "plant closing" as the permanent or temporary shutdown of a single site of employment, which results in an employment loss to a certain minimum number of employees. 29 U.S.C. § 2101(a)(2). "Mass layoff" is defined as a reduction-in-force, resulting from a plant closing, which results in a certain minimum employment loss. 29 U.S.C. § 2101(a)(3). A layoff must last more than six months before it qualifies as actionable under WARN. 29 U.S.C. § 2101(a)(6)(B).

what it deemed to be the applicable statute of limitations. The employees' motion for reconsideration was denied on August 26, 1993. This appeal followed.

*United Steelworkers of America v. Crown Cork & Seal Co., Inc.* ("Crown Cork"), arises out of an event that took place on September 30, 1991. On that day, the company ordered a reduction-in-force and shutdown of its Perry, Georgia plant. As a result of this reduction in force, about 85 employees were terminated. On October 15, 1992, the United Steelworkers of America (the union) filed a complaint, alleging that the company violated WARN by failing to give it 60 days notice prior to the shutdown. Crown Cork & Seal then moved for summary judgment, contending that the action was barred by the applicable statute of limitations. The district court denied the motion on August 24, 1993 but in an order dated September 26, 1993, certified the August order for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292.

We have jurisdiction over the appeal in *Thomas v. North Star Steel* pursuant to 28 U.S.C. § 1291. Our jurisdiction over *United Steelworkers of America v. Crown Cork & Seal* arises from our October 13, 1993 Order granting the company permission to appeal pursuant to 28 U.S.C. § 1292(b). Our review over both cases is plenary.

*Discussion*

In this case we visit a general question of federal law that we have repeatedly addressed: When a federal statute does not contain an explicit statute of limitations, when is it appropriate to borrow a statute of limitations from elsewhere in federal law rather than adopting the most closely analogous state statute of limitations.

The companies argue that in this case, a federal statute —the six-month statute of limitations contained in section 10(b) of the National Labor Relations Act ("NLRA") for filing a claim of an unfair labor practice with the Na-

tional Labor Relations Board ("NLRB")—provides the most appropriate limitations period. The employees and the union exhort us to borrow one of various state statutes. Courts addressing the question have adopted both approaches. Some have borrowed the six-month § 10(b) statute; *see, e.g., Newspaper and Mail Delivers' Union of N.Y. and Vicinity v. United Magazine Co.*, 809 F. Supp. 185 (E.D.N.Y. 1992) (adopting NLRA statute); *Staudt v. Glastron, Inc.*, No. SA-92-CA-1174, 1993 WL 85356, 1993 U.S. Dist. LEXIS 3090 (W.D.Tex. February 23, 1993) (same). Other courts, including the only Court of Appeals to reach the question, have expressly considered and rejected the section 10(b) six-month period, instead opting for various state law limitations periods. *See, e.g., United Paperworkers Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1992) (hereinafter *United Paperworkers*); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192 (E.D. Mich. 1993) (rejecting NLRA statute and adopting six-year state contract statute); *Automobile Mechanics' Local No. 701 of the Int'l Assoc. of Machinists & Aerospace Workers v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432 (N.D. Ill. 1993) (rejecting NLRA statute and adopting, without specifying, most analogous state statute).

The two district court opinions before us now reached contrary conclusions. The district court in *North Star Steel* adopted the six-month statute of limitations set forth in § 10(b); the court in *Crown Cork & Seal* rejected the § 10(b) statute, and without deciding the appropriate statute of limitations, found the action timely under all of the possibilities.

Our analysis must begin with the general assumption that when a federal statute is silent as to a statute of limitations, the court should apply "the most closely analogous statute of limitations under state law." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983); *see also Lampf, Pleva, Lipkind, Prupis &*

*Petigrow v. Gilbertson*, 501 U.S. 350, ——, 111 S.Ct. 2773, 2778 (1991); *Haggerty v. USAIR, Inc.*, 952 F.2d 781, 783 (3d Cir. 1992). This general rule is not set in stone, however. Rather, the United States Supreme Court has recognized that, in order to prevent frustration of federal policy, it is sometimes more appropriate to borrow a limitations period from an analogous area of federal law. *DelCostello*, 462 U.S. at 162. This exception is "closely circumscribed", *see Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989), and should only be applied "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking". *DelCostello*, 462 U.S. at 172.

In following the principles enunciated in *DelCostello* and *Reed*, we repeatedly have recognized our duty "to take seriously [the Supreme Court's admonition] that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies." *Reed*, 488 U.S. at 327. For instance, the mere fact that a statute touches upon issues of labor law does not mean that the Court must resort to the statute of limitations contained in § 10(b) of the NLRA. Thus, in *Eichleay Corp. v. Intern. Ass'n of Bridge, Structural and Ornamental Iron Workers*, 944 F.2d 1047 (3d Cir. 1991), we applied a state statute of limitations for vacating arbitration awards to an action to enforce an arbitration awards pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Similarly, in *Brenner v. Local 514, United Brothers of Carpenters*, 927 F.2d 1283 (3d Cir. 1991), we remanded the case to the district court to apply the most closely analogous state statute of limitations to a § 301 claim of retaliation against internal union activities. In *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123 (3d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988), we applied

Pennsylvania's four-year breach of contract statute of limitations to a union member's claim that the union failed to rebate dues and improperly charged disabled workers. In this case, as in those, the federal statute may be borrowed only if it clearly provides a closer analogy than the available state statutes. Answering this question requires us to focus on the respective policies behind the NLRA and WARN.

The primary purpose of the NLRA is "to protect the right of workers to join together in labor organizations and collectively bargain for the terms and conditions of employment." *United Paperworkers*, 999 F.2d at 54; *see also Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 20-21 (1987). The statute "is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Fort Halifax*, 482 U.S. at 20 (*citing Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)). More specifically, as the Supreme Court noted in *Reed*, the NLRA has "effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures". *Reed*, 488 U.S. at 329. The NLRA, then, is concerned with the importance and integrity of a process. From the NLRA's perspective, "minimum terms of employment" that may arise from another federal statute—or from the process of collective bargaining itself—are irrelevant so long as the process is fair.

The six-month statute of limitations set forth in § 10 (b) represents Congress's view of the proper balancing of the various interests involved in the process of collective bargaining. The six-month period takes into account "the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement

under the collective-bargaining system." *DelCostello,* 462 U.S. at 171 (*quoting United Parcel Service, Inc. v. Mitchell,* 451 U.S. at 70-71 (1980) (opinion concurring in the judgment)). In *DelCostello* itself, it was precisely this direct effect on the collective bargaining process that led the Court to invoke the § 10(b) statute of limitations. That case involved a § 301 hybrid suit (1) against an employer for breach of a collective bargaining agreement pursuant to the NLRA, and (2) against a labor union for breach of the duty of fair representation. Such a hybrid action really alleges that the process of collective bargaining has broken down. Thus, the NLRA policies applied: "The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.'" *DelCostello,* 462 U.S. at 171 (*quoting Mitchell,* 451 U.S. at 70-71 (opinion concurring in judgment)).

In *DelCostello,* the parallels between the cause of action and the policies behind the NLRA were unmistakable. In *Reed,* however, the Supreme Court, while acknowledging that many employment-related statutes affecting labor will in some way affect the collective bargaining process, cautioned that even plausible "tangential and remote" effects upon collective bargaining are insufficient to warrant departure from the general rule. *Reed,* 488 U.S. at 330, 331. Thus, the Court refused to borrow the § 10(b) NLRA statute of limitations to govern a union member's free speech claim against the union.

WARN falls into this latter category—any effects it has on collective bargaining are tangential at best. The benefits of WARN accrue not only to unionized workers but to all workers alike. WARN, like dozens of other employment statutes which bestow substantive rights simply

"gives employees something for which they otherwise might have to bargain." *Fort Halifax*, 482 U.S. at 21 (addressing Maine plant closing law). That is why in that case, the Supreme Court held that the NLRA did not preempt a Maine statute providing protection to workers from plant closings. Unlike the NLRA, the Maine regulation "provide[d] protection to individual union and nonunion workers alike, and thus 'neither encourage[d] nor discourage[d] the collective bargaining processes . . . .'" *Fort Halifax*, 482 U.S. at 21 (*quoting Metropolitan Life*, 471 U.S. at 755). The WARN protections, like the Maine plant closing law discussed in *Fort Halifax*, is [sic] also properly understood as establishing part of the "backdrop" of rights that the parties bring to the collective bargaining table, and not as affecting the substantive rights that may emerge from the collective bargaining discussions. *Fort Halifax*, 482 U.S. at 21.

WARN serves a broader purpose as well, that goes beyond the employer-employee relationship addressed by the NLRA. The statute mandates that employers planning a plant closing or mass lay-off must notify the "chief elected official of the unit of local government within which such closing or layoff is to occur". 29 U.S.C. § 2102(a)(2). Employers who fail to comply with the provision are subject to civil penalties of $500 per day. 29 U.S.C. § 2104(a)(3). Thus, WARN serves very broad societal goals—to protect workers, their families and their communities in the wake of potentially harmful employment decisions. Its remedial nature really has very little to do with the day to day process of collective bargaining.

To be sure, it cannot be said that WARN has *no* effect on collective bargaining. The companies point out, for example, that under the NLRA, an employer must provide notice to represented workers, in order to give the workers the opportunity for meaningful bargaining. *See, e.g.*[,] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). This fact does present a superficial

rememblance between the NLRA and WARN, but on closer inspection, it highlights the difference. The rights bestowed by the NLRA focus solely on the need for a meaningful collective bargaining process; WARN provides an across-the-board substantive right. The implementing regulations of the statute highlight this crucial distinction by providing that "[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but *may not reduce WARN rights.*" 20 C.F.R. § 639.1(g) (emphasis added). In other words, the NLRA requires notice to protect the meaningfulness of the collective-bargaining process; WARN's purpose is to substantively protect employees and their communities.

The fact that courts have looked to NLRA cases in interpreting WARN, and the fact that there are some definitional overlaps, does not change this fundamental distinction between the two statutes. At best, WARN has a family resemblance to the NLRA. In *Brenner v. Local 514, United Brothers of Carpenters,* 927 F.2d 1283 (3d Cir. 1991), we rejected the proposition that a family resemblance is sufficient to justify adopting the § 10(b) statute of limitations. There, we held that a claim against a union for breach of the duty of fair representation, while having some effect upon the collective bargaining atmosphere, did not have an effect sufficient enough to counsel adoption of the federal statute. *Id.* at 1295. In order to justify departing from the general rule, the analogy must be more direct.[2]

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[2] The lack of similarity between the NLRA and WARN becomes even starker when one looks at the remedies afforded by the respective statutes. Under the NLRA, the National Labor Relations Board has broad discretion to " 'take such affirmative action including reinstatement of employees . . . as will effectuate the policies of [the Act]' to remedy an employer's unfair labor practices." *Tubari Ltd., Inc. v. NLRB,* 959 F.2d 451, 453 (3d Cir. 1992). WARN by its very terms precludes such broad equitable relief; "[A] Federal court shall *not* have authority to enjoin a plant closing or mass layoff." (emphasis added). Similarly, the

As the Second Circuit pointed out in *United Paperworkers*, courts adopting the section 10(b) statute of limitations for WARN actions "have failed to grasp this crucial distinction between statutes which specifically regulate the collective bargaining relationship and those which remain peripheral to that concern." *United Paperworkers*, 999 F.2d at 55.

Nonetheless, despite the vast gulf between the respective policies behind the NLRA and WARN, the companies look for relief in our own prior decision of *Haggerty v. USAir*. Their reliance is misplaced. That case addressed the Employee Protection Program of the Airline Deregulation Act, 49 U.S.C. § 1552(d)(1) (1988) ("EPP"), a federal statute which provided certain air carrier employees with a right of first hire against other air carriers. The EPP directly affected the collective bargaining environment by impacting on "the seniority relationships of other employees . . . ." *Haggerty*, 952 F.2d at 787. As in *DelCostello*, this direct impact on the collective bargaining environment required a statute of limitations that furthered the need for the rapid resolution of labor disputes. And since, as we noted in *Haggerty* itself, the airline industry was nearly 90% unionized and the right-to-hire program was inserted into the statute at the insistence of unions, the six-month section 10(b) statute of limitations was the obvious choice.[3]

In determining whether to apply a federal statute of limitations, we also have considered whether the federal policies at stake and the practicalities of litigation make the NLRA statute "a significantly more appropriate ve-

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NLRB's discretion in awarding back pay is broad. *See Tubari*, 959 F.2d at 453. WARN, though, provides a strict statutory mechanism for computing damages.

[3] We also found that "as with the NLRA, the Department of Labor has had a role in administering the EPP as the agency charged with maintaining a listing of airline vacancies for the use of protected employees under the EPP." *Haggerty*, 952 F.2d at 787.

hicle for interstitial lawmaking". *DelCostello,* 462 U.S. at 172; *Haggerty,* 952 F.2d at 786. The companies argue that WARN requires a single federal statute of limitations, because subjecting the companies to multiple state statutes of limitations would make it difficult for employers to calculate their contingent liabilities.

This case simply does not present serious uniformity concerns. The need for uniformity becomes real only when the federal statute at issue contains numerous types of claims and legal theories or when the prospect of multiple state statutes of limitation[s] presents serious practical problems. Uniformity concerns motivated the Supreme Court in *Wilson v. Garcia,* 471 U.S. 261 (1985), to apply a uniform limitations period (a state limitations period in that case) to claims arising under 42 U.S.C. § 1983. As the Court pointed out, claims under the broad civil rights statute "would encompass numerous and diverse topics and subtopics." *Wilson,* 471 U.S. at 273. Thus, "[i]f the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim." *Id.* at 273-74. The Court used similar reasoning in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,* 483 U.S. 143 (1987): Since RICO "encompass[es] numerous diverse topics and subtopics . . . a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " *Id.* at 149-50 (*quoting Wilson,* 471 U.S. at 273, 272).

In *Haggerty,* we relied on uniformity concerns in deciding to apply the section 10(b) statute. Under the EPP, a protected employee who had been terminated or furloughed could claim a right of first hire with *any other carrier* that was hiring employees. We noted that airline carriers would have difficulty "managing a cohesive policy with respect to the EPP were they subject

to the varying limitations periods of each of the states in which they operate." *Haggerty*, 952 F.2d at 786. Thus, without a uniform federal statute of limitations, the entire airline industry faced constant and protracted uncertainty.

Unlike RICO and Section 1983, WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries. And unlike the EPP, under which an airline may be the fortuitous victim of events involving other air carriers all across the country, WARN's obligations simply do not implicate such geographic concerns favoring uniformity. As the Second Circuit put it:

> "The term 'plant closing' as defined by the Act is limited to single sites of employment, and venue is limited to the district where the violation is alleged to have occurred or where the employer does business; unless a single plant site straddles the boundary between two states, it is unlikely prospective plaintiffs will have a broad choice of fora in which to bring their claims or that doubt will arise as to in which state triggering events occurred. Therefore, geographic considerations do not counsel for the application of a uniform federal limitations period for WARN Act claims." *United Paperworkers*, 999 F.2d at 56 (quoting district court opinion).

Because of these same factors, "courts will have little difficulty in determining which state's law to apply and workers will gain few advantages by suing in a court far from the site of injury." *United Paperworkers*, 999 F.2d at 56.[4]

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[4] Since the *Crown Cork & Seal* action occurred in Perry, Georgia, there is a question as to whether the statute of limitations should be borrowed from Georgia or Pennsylvania law. We have previously held that "as a general rule the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application

The companies' further concern about the effect of a plant closing on service of process, and on the mechanics of litigation, simply do not implicate federal concerns; rather, they are the same concerns at issue in every cause of action, whenever the statute of limitations is longer then [sic] a year or so.

On the other hand, a short statute of limitations could very well frustrate the policies behind WARN. As the Second Circuit found, under the complex administrative scheme of the NLRA, in which the NLRB plays a large and active role in prosecuting claims, "[t]he burden on complainants in pursuing a claim is minimal, justifying the short statute of limitations." *United Paperworkers,* 999 F.2d at 55. WARN does not contain those administrative safeguards, and a six-month statute could very well constitute too great a burden on the claimants.

Finally, cases finding that the practicalities of litigation favor adoption of a federal statute of limitations have focused on the problems with the potential state statutes. For example, in *DelCostello,* the Court pointed out that the two possible state statutes were inconsistent with the relevant federal policy favoring the finality of settlements and the opportunity to attack an unfair result under collective bargaining. The extremely short time periods in state arbitration statutes "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine." *Id.* at 166. Conversely, the relatively lengthy time period

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of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants." *Consolidated Express, Inc. v. New York Shipping Association, Inc.,* 602 F.2d 494, 507-08 (3d Cir. 1979), *vacated on other grounds,* 448 U.S. 902 (1980). We need not decide whether the statute of limitations should be borrowed from Pennsylvania or Georgia law, since no party has brought to the lower courts' attention a statute of limitations, from either state, under which the instant actions would be untimely.

governing legal malpractice claims "would preclude the relatively rapid final resolution of labor disputes favored by federal law—a problem not present when a party to a commercial arbitration sues his lawyer." *Id.* at 168.

Here, the state statutes of limitations brought to the lower courts' attention—which range from the two-year period for enforcing civil penalties under 42 Pa. Cons. Stat. Ann. § 5524(5) to Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527—do not interfere with federal policy.[5] Because of WARN's remedial nature and its limited effect on collective bargaining, a short statute of limitations is unnecessary. And none of the state statutes are so short as to interfere with a worker's potential for seeking or gaining relief. While we acknowledge that none of the possible state laws provide perfect analogies to WARN, the absence of a perfect analogy is an insufficient reason to depart from the general rule, particularly when federal law does not provide a satisfactory alternative. *See, e.g., DelCostello*, 462 U.S. at 171; *Gavalik v. Continental Can Co.*, 812 F.2d 834, 847 (3d Cir. 1987).

Here, we need not decide which state statute applies, since the actions would be timely under any of the possible statutes of limitations brought to the court's attention.

*Conclusion*

We conclude that, for the reasons detailed above, for actions arising under WARN, courts must apply the most closely analogous state statute of limitations. We therefore will affirm the district court's Order in *United Steelworkers of America v. Crown Cork & Seal* denying Crown Cork & Seal's motion for summary judgment. We will

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[5] Other possible state statutes of limitations include the three year period set forth in 43 Pa. Stat. Ann. § 260.9a(g) for bringing claims under the Pennsylvania Wage Payment and Collection Law, and the four year limitations period for breach of an implied contract, 42 Pa. Cons. Stat. Ann. § 5525(4).

reverse the Order of the district court in *Thomas v. North Star Steel* granting North Star's motion for summary judgment in favor of North Star. These cases will be remanded to the respective district courts for further proceedings consistent with this opinion. Costs taxed against the appellant in 93-2008. Costs taxed against the appellee in 93-7613.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

**APPENDIX B**

UNITED STATES DISTRICT COURT
M.D. PENNSYLVANIA

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No. 4:CV-92-1507

CHARLES A. THOMAS, *et al.*,
*Plaintiffs,*

v.

NORTH STAR STEEL COMPANY, INC.,
*Defendant.*

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May 25, 1993

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ORDER

MUIR, District Judge.

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On October 23, 1992, the Plaintiffs filed this action pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.* The events which form the basis of this action occurred on February 25, 1991. On that date North Star Steel Company, Inc. (hereafter "North Star Steel"), laid off approximately 270 employees at its Milton, Pennsylvania, plant. The Plaintiffs allege that they are entitled to damages because they were laid off without any notice.

On April 1, 1993, the parties filed cross motions for summary judgment. Both of those motions have been fully briefed and are ripe for disposition.

The standard for summary judgment pursuant to Federal Rule of Civil Procedure 56 is well settled. Summary judgment is not proper where a reasonable jury could find for the non-moving party on a material issue of fact. Since a reasonable jury presumably needs more than a scintilla of evidence to find in favor of a party with the burden of persuasion, more than that amount of evidence must be produced by the non-movant in order to survive a summary judgment motion. The non-movant must present evidence beyond his or her pleadings to meet this requirement. *Williams v. Borough of West Chester,* 891 F.2d 458, 459-60 (3d Cir. 1989). We first address North Star Steel's motion for summary judgment.

In its motion North Star Steel argues that the Plaintiffs' claims are time barred because they commenced this action approximately 20 months after the events which gave rise to their cause of action. North Star Steel reasons that the appropriate statute of limitations for actions brought pursuant to the Worker Adjustment and Retraining Notification Act is six months. In response the Plaintiffs argue that their complaint was timely filed because the applicable statute of limitations is three years.

The Worker Adjustment and Retraining Notification Act does not contain an express statute of limitations. In such instances the United States Supreme Court has "generally concluded that Congress intended that the Courts apply the most closely analogous statute of limitations under state law." *Reed v. United Transp. Union,* 488 U.S. 319, 323, 109 S.Ct. 621, 625, 102 L.Ed.2d 665 (1989) (quoting *DelCostello v. Teamsters,* 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983)). However, that general principle does not apply

> when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a signifi-

> cantly more appropriate vehicle for interstitial lawmaking.

*Id.* (quoting *DelCostello,* 462 U.S. at 172, 103 S.Ct. at 2294).

The Plaintiffs assert that the general principle should be followed and that the statute of limitations in Pennsylvania's Wage Payment and Collection Law, which is three years, should be applied in this case.

The Wage Payment and Collection Law, 43 P.S. §§ 260.1 *et seq.,* does not create an employee's right to compensation but only establishes a right to enforce the payment of wages and compensation to which an employee is otherwise entitled. 43 P.S. § 260.5(a); *Weldon v. Kraft, Inc.,* 896 F.2d 793 (3d Cir. 1990). The Worker Adjustment and Retraining Notification Act differs from the Pennsylvania Wage Payment and Collection Law in that the former creates a statutory right to monetary damages when an employer violates its provisions.

In *Haggerty v. USAir, Inc.,* 952 F.2d 781 (3d Cir. 1992), the Court of Appeals for the Third Circuit declined to borrow the statute of limitations in the Pennsylvania Wage Payment and Collection Law in a case brought pursuant to a federal statute that did not contain a statute of limitations. The statute at issue in *Haggerty* was the Employee Protection Program which was an amendment to the Airline Deregulation Act. The Employee Protection Program "gave a protected employee not only a 'first right of hire' by any other air carrier but also a right to recall and [to] retention of seniority in his or her original air carrier employment." *Haggerty,* 952 F.2d at 785. That Program implicitly provided that an employee covered by it could bring an action based on the statutory rights that it created.

In deciding that the statute of limitations in the Pennsylvania Wage Payment and Collection Law did not ap-

ply to Haggerty's claim brought pursuant to the Employee Protection Program, the Court of Appeals stated that

> [t]he wage payment law is for payment of wages to employees, not for hiring claims, and it is premised on a contractual obligation that an employer has to pay wages and benefits, not a statutory right like the one here.

*Id.* at 786 (footnote omitted). That reasoning applies to this case because the Plaintiffs seek to enforce a statutory right established by the Worker Adjustment and Retraining Notification Act and their action is not premised on any pre-existing contractual obligation between them and North Star Steel. However, that conclusion does not end our inquiry.

We may decline to borrow a state statute of limitations only where: (1) a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes; and (2) when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking. *Reed v. United Transp. Union, supra.* North Star Steel argues that the National Labor Relations Act is the appropriate statute from which we should borrow the applicable statute of limitations. The statute of limitations in that Act is six months. 29 U.S.C. § 160(b).

We must determine whether the National Labor Relations Act is more analogous to the Worker Adjustment and Retraining Notification Act than any available state statute. We initially note that in another action against North Star Steel which had arisen from the same facts in this case, we analogized for the purposes of awarding prejudgment interest and of awarding attorney's fees an action brought under the Worker Adjustment and Retraining Notification Act to one pursuant to the National Labor Relations Act for the purposes of awarding prejudgment interest and of awarding attorney's fees. *United*

*Steelworkers of America v. North Star Steel Corp.*, 809 F.Supp. 5 (M.D.Pa. 1993). We supplement our conclusion in that case with the following factors.

A number of the provisions in the Worker Adjustment and Retraining Notification Act apply specifically where the terminated employees are represented by a union and other provisions explicitly refer to the National Labor Relations Act. Both the National Labor Relations Act and the Worker Adjustment and Retraining Notification Act bestow statutory rights upon employees. While the specific rights created by each statute are different, the policies behind each of the acts are consistent, mutually-reinforcing, and to some extent identical.

The purposes of the National Labor Relations Act are

> to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b).

The goal of the Worker Adjustment and Retraining Notification Act is to provide

> protection to workers, their families, and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill train-

> ing or retraining that will allow these workers to successfully compete in the job market.

20 C.F.R. § 639.1(a) (1992). Both statutes protect employees from job loss.

The analogy between the two statutes is strengthened by the fact that the regulations interpreting the Worker Adjustment and Retraining Notification Act provide that "[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but may not be used to reduce WARN rights." 20 C.F.R. § 639.1(g) (1992). The collective bargaining procedure is one of the tools which the National Labor Relations Act placed in the hands of employees.

We are of the view that the framework and goals of the National Labor Relations Act are such that it is more analogous to the Worker Adjustment and Retraining Notification Act than to any state statute of which we are aware.

In the light of that conclusion we must decide whether the federal policies at stake and the practicalities of litigation make the rule borrowed from the National Labor Relations Act a significantly more appropriate vehicle for interstitial lawmaking than any state statute.

With respect to that issue, the United States Supreme Court has stated that the threshold inquiry is "whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.'" *Agency Holding Corp. v. Malley-Duff & Assoc.'s,* 483 U.S. 143, 147, 107 S.Ct. 2759, 2762, 97 L.Ed.2d 121 (quoting *Wilson v. Garcia,* 471 U.S. 261 268, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254 (1985)). When making that inquiry, the Court of Appeals for the Third Circuit has stated that it "really entails an analysis

of whether claims under a statute are enough alike so that a uniform statute of limitations should be applied to all of them, at least on a state-by-state basis." *Haggerty*, 952 F.2d at 784 (footnote omitted). The Court of Appeals in *Haggerty* further reasoned that a uniform, federal statute of limitations should be applied to claims which arise "out of a similar factual matrix." *Id.* at 785-86.

We believe that claims pursuant to the Worker Adjustment and Retraining Notification Act arise out of factually-similar circumstances in that all such claims will encompass a plant closing or mass layoff of at least 100 employees. We next address the federal policies at stake and the practicalities of litigation pursuant to the Worker Adjustment and Retraining Notification Act.

A uniform statute of limitations applied nationwide is appropriate for claims brought pursuant to the Worker Adjustment and Retraining Notification Act because, as in *Haggerty*, "[a] lack of uniformity among the many state jurisdictions in which [the claims arise] can cause uncertainty for both employees and employers." *Id.* at 786. In the regulations passed pursuant to the Worker Adjustment and Retraining Notification Act, the Department of Labor has foreseen "that Federal rulemaking cannot address the multitude of industry and company-specific situations in which [the Act will apply]." 20 C.F.R. § 639.1(b) (1992). The Department of Labor's concerns appear to include potential complications caused by the application of a patchwork of different state laws to a single company. Although all actions arising under the Worker Adjustment and Retraining Notification Act may be based upon a factually-similar scenario, problems may arise as a result of "a major automaker which has dozens of automobile plants throughout the country." 20 C.F.R. § 639.3(a)(4). A uniform statute of limitations would benefit employees and employers when a single employer may be subject to liability pursuant to the Worker Adjustment and Retraining Notification Act in

various states. The practicalities of litigation arising under the Worker Adjustment and Retraining Notification Act favor a uniform, federal statute of limitations.

With respect to the federal policies at stake, we are of the view that the policies furthered by the Worker Adjustment and Retraining Notification Act mirror those which prompted passage of the National Labor Relations Act. There is a substantial federal interest in labor-management relations and the effect of mass layoffs on interstate commerce.

We conclude that in actions brought pursuant to the Worker Adjustment and Retraining Notification Act, it is appropriate to borrow the six-month statute of limitations set forth in the National Labor Relations Act. 29 U.S.C. § 160(b). Two other United States District Courts which have addressed the issue have reached the same result. *Newspaper & Mail Deliverers' v. United Magazine,* 809 F.Supp. 185 (E.D.N.Y. 1992); *Staudt v. Glastron, Inc.,* 8 Indiv. Empl. Rts. Cas. (BNA) 462, 1993 WL 85356 (W.D. Tex. 1993); *but see, Wallace v. Detroit Coke Corp.,* No. 92-72891 slip op., 1993 WL 104242 (S.D.N.Y. Feb. 26, 1993) (state statute of limitations applies in WARN action).

The Plaintiffs argue that North Star Steel should be equitably and collaterally estopped from asserting that the applicable statute of limitations is six months. However, the Plaintiffs have not shown that they relied upon any representation of North Star Steel and they have not shown that the issue of the statute of limitations had been raised in any case based on the same factual allegations. North Star Steel is not estopped from advancing the argument that the applicable statute of limitations is six months.

North Star Steel's motion for summary judgment should be granted because there are no material facts in dispute, the appropriate statute of limitations is six months, and

this action was filed approximately 20 months after the events upon which it is based had occurred.

In light of that conclusion, Plaintiffs' motion for summary judgment will be denied as moot.

NOW, THEREFORE, IT IS ORDERED THAT:

1. North Star Steel's motion for summary judgment based on the contention that this action is time barred is granted.

2. The Plaintiffs' motion for summary judgment is denied as moot.

3. The Clerk of Court shall enter judgment for North Star Steel.

4. The Clerk of Court shall close this file.

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

---

No. 4:CV-92-1507

Complaint Filed 10/23/92

(Judge Muir)

CHARLES A. THOMAS, *et al.*,
*Plaintiffs*

vs.

NORTH STAR STEEL COMPANY, INC.,
*Defendant*

---

ORDER

August 26, 1993

---

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 25, 1993, we granted Defendant North Star Steel Company, Inc.'s (hereafter "North Star Steel") motion for summary judgment. In that order we concluded that the applicable statute of limitations is six months and that this case was time-barred because the Plaintiffs brought it approximately 20 months after the facts upon which it is based occurred.

On June 10, 1993, the Plaintiffs filed a motion to vacate judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. After being granted an extension of time to do so, the Plaintiffs timely filed a brief in

support of that motion on July 19, 1993. North Star Steel filed its brief in opposition on August 6, 1993. The time allowed for the Plaintiffs to file a brief in reply has expired, they have filed none, and the matter is ripe for disposition.

The grounds upon which we may grant a motion pursuant to Rule 59(e) are limited. Such a motion may be based only upon (1) an intervening change in controlling law; (2) the presentation of new evidence not previously available which, if discovered previously might have affected the Court's decision; or (3) to correct a manifest error of law or fact. Harasco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Moreover,

> A Rule 59(e) motion is not to be used as a means "to reargue matters already argued and disposed of" by prior rulings "or to put forward additional arguments which it could have made but neglected to make before judgment."

McDowell Oil Serv. v. Interstate Fire & Casualty Company, 817 F.Supp. 538, 541 (M.D. Pa. 1993) (citations omitted) (McClure, J.).

In their motion the Plaintiffs assert, albeit in broad terms, grounds which would entitle them to the relief sought in their motion. However, in the brief supporting their motion they

> . . . urge the court to reconsider [the arguments presented in Plaintiff's Memorandum In Opposition To Defendant's Motion For Summary Judgment] in light of the fast-developing caselaw on an issue which is one of first impression in all jurisdictions known to have considered it. For this purpose, Plaintiffs hereby readopt and request the Court to incorporate into this brief all of the arguments and citations to authorities set forth in Part IIA1-3 (pages 2-17) of said Memorandum filed in this matter [on May 5, 1993].

Plaintiffs' Memorandum In Support of Motion To Vacate Judgment, page 1. That portion of the Plaintiffs' brief reveals that they essentially reargue the position they presented in their brief in opposition to North Star Steel's motion for summary judgment. The Plaintiffs have not convinced us that there has been an intervening change in controlling law, they have not presented any new evidence, and they do not identify any error in our order of May 25, 1993.

The Plaintiffs have not presented an appropriate basis for the relief sought in their motion filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In our view their arguments are best characterized as disagreements which may be pursued through other avenues of relief.

NOW, THEREFORE, IT IS ORDERED THAT:

The Plaintiffs' motion to vacate the judgment entered pursuant to our order of May 25, 1993, is denied.

/s/ Muir
MUIR
U.S. District Judge

# APPENDIX D

## STATUTORY PROVISIONS

## NATIONAL LABOR RELATIONS ACT

### CHAPTER 23—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

**§ 2101. Definitions; exclusions from definition of loss of employment**

(a) Definitions.—As used in this chapter—

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 45;

(5) The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss.—(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser

shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(Pub.L. 100-379, § 2, Aug. 4, 1988, 102 Stat. 890.)

**§ 2102. Notice required before plant closings and mass layoffs**

(a) Notice to employees, state dislocated worker units, and local governments.—An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training

Partnership Act [29 U.S.C.A. § 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period.—(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period.—A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless—

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable, that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss.—For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

(Pub.L. 100-379, § 3, Aug. 4, 1988, 102 Stat. 891.)

**§ 2103. Exemptions**

This chapter shall not apply to a plant closing or mass layoff if—

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice pursuant to section 2102(a) of this title when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations

Act [29 U.S.C.A. § 151 et seq.]: *Provided,* That nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act. [29 U.S.C.A. § 151 et seq.]:

(Pub.L. 100-379, § 4, Aug. 4, 1988, 102 Stat. 892.)

**§ 2104. Administration and enforcement of requirements**

(a) Civil actions against employers.—(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies.—The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

(Pub.L. 100-379, § 5, Aug. 4, 1988, 102 Stat. 893.)

### § 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

(Pub.L. 100-379, § 6, Aug. 4, 1988, 102 Stat. 894.)

### § 2106. Procedures encouraged where not required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(Pub.L. 100-379, § 7, Aug. 4, 1988, 102 Stat. 894.)

### § 2107. Authority to prescribe regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpreta-

tive regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

(Pub.L. 100-379, § 8, Aug. 4, 1988, 102 Stat. 894.)

### § 2108. Effect on other laws

The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act [29 U.S.C.A. § 151 et seq.] or the Railway Labor Act [45 U.S.C.A. § 151 et seq.].

(Pub.L. 100-379, § 9, Aug. 4, 1988, 102 Stat. 894.)

### § 2109. Report on employment and international competitiveness

Two years after Aug. 4, 1988, the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this chapter on employers (especially small- and medium-sized businesses), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

(Pub.L. 100-379, § 10, Aug. 4, 1988, 102 Stat. 894.)

## § 160. Prevention of unfair labor practices

* * * *

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Supreme Court, U.S.
FILED
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No. 94-834

In the

# Supreme Court of the United States

October Term 1994

NORTH STAR STEEL COMPANY,
*Petitioner*,

v.

CHARLES A. THOMAS, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## MEMORANDUM IN RESPONSE TO THE PETITION

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November 17, 1994

## QUESTION PRESENTED

In actions brought under the Worker Adjustment and Retraining Notification Act ("WARN"), should courts borrow the limitations period from the National Labor Relations Act, as opposed to state law or another federal statute, such as the Fair Labor Standards Act?

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NORTH STAR STEEL COMPANY,
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---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

---

## MEMORANDUM IN RESPONSE TO THE PETITION

---

We agree with petitioner that the question of the proper limitations period for suits filed under the Worker Adjustment and Retraining Act ("WARN") is one about which the lower federal courts have expressed widespread disagreement, which is not likely to be resolved until reviewed by this Court. Moreover, the limitations issue is cleanly presented in this case, and the ruling on this statute may affect limitations questions under a number of other federal statutes, about which the lower courts continue to disagree. Accordingly, the Court should grant certiorari.

## STATEMENT

### A. Facts.

Until 1991, petitioner North Star Steel Company operated a production facility in Milton, Pennsylvania. Most of its employees were paid by the hour and were represented in collective bargaining by the United Steelworkers of America ("USWA"). Respondents were salaried employees who did not belong to the USWA.

On February 25, 1991, petitioner announced that all of its employees would be laid off, effective immediately, for an indefinite period, and that the plant would be closed for the time being. None of the employees, hourly or salaried, was given any advance notice of this action. Petitioner refused to state how long the plant would be closed, or even whether the closure was permanent. Respondent Thomas made numerous inquiries about petitioner's plans, but received only vague and inconclusive answers.

On September 9, 1991, the USWA, not accepting petitioner's claim that it was unsure how long the layoff would last, filed suit claiming that North Star's failure to provide advance notice violated WARN. *USWA v. North Star Steel*, 809 F. Supp. 5, 6 (M.D. Pa. 1992), *aff'd*, 5 F.3d 48 (3d Cir. 1993). USWA sued only on behalf of the employees whom it represented, and it did not seek any relief for the respondents here. *Id.* at 7.

On April 9, 1992, the district court granted summary judgment against petitioner. *USWA v. North Star Steel Co.*, *supra*. On May 21, 1992, petitioner promised respondent Thomas that it would make the same payments to its non-union employees as the district court decided had to be made to the USWA's members. Although petitioner continued to make such promises, it ultimately provided respondents only with their accumulated vacation and severance pay, which would have been payable even if WARN did not apply.

**B. Proceedings Below.**

On October 23, 1992, respondents filed this action in the United States District Court for the Western District of Pennsylvania, alleging that petitioner's failure to notify them violated WARN. Petitioner's answer did not deny that it had violated WARN, but it did raise the statute of limitations as an affirmative defense. The district court granted summary judgment and dismissed on the ground that the most appropriate limitations period to borrow for WARN was the six-month period allowed by the National Labor Relations Act ("NLRA") for filing unfair labor practices charges with the National Labor Relations Board ("NLRB"). 838 F. Supp. 970, Pet. App. 17a-25a.

A unanimous court of appeals reversed. 32 F.3d 53 (3d Cir. 1994), Pet. App. 1a-16a. The court began by noting this Court's repeated holdings that, if a federal statute is silent on the statute of limitations, the normal rule is that courts should borrow the most closely analogous state law limitations period. *E.g.*, *Reed v. UTU*, 488 U.S. 319 (1989); *DelCostello v. Teamsters*, 462 U.S. 151 (1983), Pet. App. 5a-6a. Although there is an exception for cases where a federal limitations period "clearly provides a closer analogy" **and** the federal policies at stake make that rule "significantly more appropriate," *DelCostello*, 462 U.S. at 172, this exception is "closely circumscribed." *Reed*, 488 U.S. at 324. The court also noted this Court's expression of distress in *Reed* that many lower federal courts had failed "to take seriously our admonition" that borrowing from state law is the norm, and that using a federal statute is the rare exception, "in labor law as elsewhere." Pet. App. 6a.

Based on that standard, the court found no sound argument for borrowing from federal law. Although WARN cases and NLRA claims have some features in common, the purposes, procedures, rights and remedies of the two statutes are quite different. *Id.* 7a-11a. Nor were there serious reasons to believe that the interest in uniform limitations

periods, for federal statutes that encompass a broad variety of claims and legal theories, provided a basis for borrowing from federal law, as in the case of RICO claims. *Agency Holding Corp. v. Malley-Duff & Assoc's*, 483 U.S. 143 (1987). *See also Wilson v. Garcia*, 471 U.S. 261 (1985) (adopting a single characterization of section 1983 claims for state borrowing purposes). Pet. App. 12a-13a. Finally, an unduly short limitations period might well frustrate the ability of affected workers to bring claims. *Id.* 14a-15a. For all these reasons, the court of appeals held that a state limitations period, rather than section 10(b)of the NLRA, should be borrowed, and accordingly the court reversed the dismissal of respondents' claims.[1]

## ARGUMENT

Although we strongly disagree with petitioners on the merits of the issue presented, we agree with petitioner that there is a division among the courts of appeals that is unlikely to be resolved without a decision by this Court. The Second Circuit has held, in agreement with the Third Circuit, that the statute of limitations for WARN actions is to be borrowed from state law. *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51 (2d Cir. 1993). However, the Sixth Circuit recognized these decisions, but

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[1] Respondents below argued that, if the court did opt to borrow from federal law, it would not be limited to borrowing section 10(b) of the National Labor Relations Act. Respondents suggested, among other possibilities, borrowing section 6 of the Portal-to-Portal Pay Act, 29 U.S.C. § 255, which provides a two-year limitations period for seeking unpaid wages under the Fair Labor Standards, Walsh-Healey, or Bacon-Davis Acts. The court of appeals did not need to reach this argument in light of its holding that the normal rule of borrowing from state law should be applied. If certiorari is granted, respondents will argue in the alternative for borrowing such a federal period.

nonetheless held that the six-month period from section 10(b) of the NLRA is to be borrowed. *UMW v. Peabody Coal Co.*, No. 93-6020 (6th Cir., October 31, 1994). The Fifth Circuit initially opted for borrowing from the NLRA, but Senior Circuit Judge Wisdom penned a powerful dissent which is, in our view, probably the best single opinion that has been written on this subject, and the Fifth Circuit has since vacated its judgment *sua sponte* and scheduled the case for *en banc* argument early next year. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *en banc reh. granted*, (5th Cir. September 22, 1994). A case raising the issue is currently pending before the Tenth Circuit. *Frymire v. Ampex Corp.*, Nos. 94-1059, 94-1090 (10th Cir.). The issue has also been decided in district courts in the Seventh and Ninth Circuits, although we are advised that those particular cases are not on appeal. In summary, we acknowledge that there is division among the lower courts that needs to be resolved by this Court.

This is an appropriate case in which to consider the question because the respondents in this case are typical of the employees who enjoy rights under WARN, in a way that points up significant differences between WARN claims and the NLRA claims that petitioner claims are so analogous that borrowing from federal law is appropriate. After all, the NLRA gives unions a right to bargain about the effects of plant closings, but that right exists only when the employer has a duty to recognize and bargain with a collective representative of its employees. Because only about 11% of American private-sector workers engage in collective bargaining, the NLRA right extends to unions representing only a small minority of all potential WARN plaintiffs. The respondents here are non-union employees, thus making them far more typical of all WARN plaintiffs than union plaintiffs would be, which would bring into focus how different WARN is from the NLRA. In that sense, this may be the best case in which to decide the WARN limitations question, at least as compared to other cases, such as *Peabody Coal*,

in which the petitions would be filed on behalf of union employees.

The question presented here is important, not only because of the division among the circuits with respect to WARN, but also because of implications that the decision here would have for limitations under other statutes. Despite *Reed v. UTU*, some lower courts continue to "fail to take seriously [the] admonition" that borrowing from state law is the norm, and using a federal statute the rare exception, "in labor law as elsewhere." 488 U.S. at 324, 327. For example, some lower courts have misconstrued the Court's concern for "uniformity" in such cases and *Wilson v. Garcia*, *Malley-Duff*, and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), where the Court adopted a single characterization of statutes that authorized a protean variety of claims, each of which might be characterized differently for limitations periods. A number of decisions by lower courts have opted for a different kind of uniformity -- adopting a single time period to govern litigation in the federal courts in every state, in order to avoid "forum-shopping" and to give defendants that operate in several different states a degree of certainty about when their exposure to litigation is ended. *E.g.*, *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1037 (2d Cir. 1992); *Haggerty v. USAir*, 952 F.2d 781, 786 (3d Cir. 1992). If that is what "uniformity" requires, of course, the result will be to create a presumption in favor of borrowing from federal law, because the **only** way to have the same amount of time for suing in every state is to use a limitations period adopted from a federal statute. This approach thus effectively reverses the long-standing presumption in favor of borrowing from state law.

The irony is that the misinterpretation of the term "uniformity" in the cases cited above occurred in circuits that have correctly applied this Court's teachings in the case of WARN, because both have refused to borrow from federal law for that purpose, in the decision below and in *Specialty*

*Paperboard, supra.* This intra-circuit difference in analysis simply points up the need for this Court to revisit the limitations area, and WARN presents a simple and straightforward opportunity to clarify the Court's holdings.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

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Attorneys for Respondents

November 17, 1994

SUPREME COURT, U.S.
FILED
FEB 21 1995
OFFICE OF THE CLERK

No. 94-834

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY,
*Petitioner,*
v.
CHARLES A. THOMAS, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## JOINT APPENDIX

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*Attorney for Respondents*

* Counsel of Record

**PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 7, 1994**
**CERTIORARI GRANTED JANUARY 6, 1995**

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| Plaintiff's Certificate of Service for Rule 59(e) Motion in the United States District Court for the Middle District of Pennsylvania, dated June 8, 1993 | 11 |
| Plaintiff's Notice of Appeal, filed September 3, 1993 | 12 |
| Letter to Charles Thomas, dated August 20, 1992 | 13 |
| Affidavit of Charles A. Thomas, dated March 31, 1993 | 15 |
| Order of the Supreme Court of the United States, dated January 6, 1995 | 22 |


The following opinion and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:


| | |
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| Opinion of the United States Court of Appeals for the Third Circuit, dated August 10, 1994 (Appendix A) | 1a |
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| Order of the United States District Court for the Middle District of Pennsylvania, dated August 26, 1993 (Appendix C) | 26a |

U.S. DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
(WILLIAMSPORT)

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Civil Docket for Case #: 92-CV-1507

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THOMAS, *et al.*

v.

NORTH STAR STEEL COMPANY

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**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 10/22/92 | COMPLAINT Receipt #: 151990 Amt: $120 |
| 10/22/92 | Summons issued as to dft North Star Steel |
| 10/22/92 | Remark: summons and complaint along w/N/C to attorney |
| 10/22/92 | Remark: case file and docket sheet to CtRmDeputy |
| 11/10/92 | ANSWER and affirmative defenses by defendant North Star Steel [Entry date 11/12/92] |
| 11/12/92 | Remark: orders 1 and 2 to Candiello |
| 11/27/92 | RETURN OF SERVICE executed upon defendant North Star Steel 11/19/92 (ackn recd 11/27/92) |
| 4/1/93 | MOTION by plaintiffs for summary judgment, statement of material facts, affidavit, attachment, C of non-conc and S, propo [Entry date 04/02/93] |
| 4/1/93 | Brief by plaintiffs in support of motion for summary judgment [Entry date 04/02/93] |
| 4/1/93 | MOTION by defendant North Star Steel for summary judgment, w/attached statement of undisputed facts, C of non-conc and S, propo [Entry date 04/02/93] |

| DATE | PROCEEDINGS |
|---|---|
| 4/1/93 | Brief by defendant North Star Steel in support of motion for summary judgment, attachments [Entry date 04/02/93] |
| 4/19/93 | MOTION by plaintiffs to extend time to file brief in opposition to motion for summary judgment; as well for defendant to file brief in opposition to Plfs' motion for summary judgment, C of conc and S, propo |
| 4/19/93 | ORDER by Judge Malcolm Muir granting motion to extend time to file brief in opposition to motion for summary judgment; as well for Dft to file brief in opposition to Plfs' motion for summary judgment to 4/26/93 |
| 4/26/93 | MOTION by plaintiffs to extend time to file brief in opposition to deft's motion for summary judgment |
| 4/26/93 | Brief by defendant North Star Steel in opposition to Plfs motion for summary judgment; reply brief due 5/10/93 [Entry date 04/28/93] |
| 4/27/93 | ORDER by Judge Malcolm Muir granting motion to extend time to file brief in opposition to dft's motion for summary judgment until May 3, 1993 |
| 5/3/93 | Brief by plaintiffs in opposition to Dft motion for summary judgment; reply brief due 5/17/93 [Entry date 05/04/93] |
| 5/3/93 | Supplement by plaintiff re brief in opposition to Dft Motion for Summary Judgment (Appendix) [Entry date 05/04/93] |
| 5/20/93 | Reply brief by defendant in support of motion for summary judgment [Entry date 05/21/93] |
| 5/21/93 | Reply brief by plaintiff in support of motion for summary judgment |

| DATE | PROCEEDINGS |
|---|---|
| 5/25/93 | ORDER by Judge Malcolm Muir granting Dft motion for summary judgment, finding the motion for summary judgment of Plfs moot. Clerk to enter jgm on behalf of North Star Steel, Clerk to close file |
| 5/25/93 | JUDGMENT Case terminated in favor of Dft and against all Plfs |
| 5/25/93 | Remark—security copy and case file to S.C.O. from Wmpt this date |
| 5/27/93 | ORDER by Judge Malcolm Muir: first sentence of 2nd para of 5/25/93 order stricken; . . . following should be inserted: ". . . mass layoff of at least 50 employees" |
| 5/27/93 | Remark: doc 35 to SCR to be put w/closed file |
| 5/27/93 | CASE FILE TO FILES-R-US |
| 6/2/93 | BILL OF COSTS—submitted by defendant in the amount of $293.68. [Entry date 06/09/93] |
| 6/2/93 | BRIEF FILED—by defendant in support of bill of costs C of S on #36 and #37. [Entry date 06/09/93] |
| 6/9/93 | Remark; Docs 36 and 37 to BQ |
| 6/10/93 | MOTION by plaintiff to vacate judgment of 5/25/93 |
| 7/2/93 | ORDER by Judge Malcolm Muir: plaintiffs may file brief in support of motion to vacate |
| 7/19/93 | Brief by plaintiff in support of motion to vacate judgment of 5/25/93 [Entry date 07/20/93] |
| 8/6/93 | Brief by defendant in opposition to motion to vacate judgment of 5/25/93 [Entry date 08/09/93] |
| 8/26/93 | ORDER by Judge Malcolm Muir denying motion to vacate judgment of 5/25/93 |

| DATE | PROCEEDINGS |
|---|---|
| 9/3/93 | NOTICE OF APPEAL—by plaintiff from District Court order filed 8/26/93 and Order of 5/25/93. (Filing fee paid, TPO mailed to attorney, certified copies, notice of appeal, order being appealed, with info/ack letter, to USCA. (cc: cnsl, Ct.) $105.00 #58235 [Entry date 09/08/93] [Edit date 09/08/93] |
| 9/9/93 | Remark; File in Room 423 |
| 9/20/93 | Notification by Circuit Court of Appellate Docket Number 93-7613 [Entry date 09/21/93] |
| 9/24/93 | Remark per phone call to Paul Levy resent TPO to atty |
| 10/5/93 | Transcript Purchase Order for dates: none TPO filed by attorney Paul Alan Levy. [Entry date 10/06/93] |
| 10/5/93 | Certified copy of docket in lieu of record on appeal transmitted to USCA [Entry date 10/06/93] |
| 10/12/93 | Acknowledgement Received from USCA of cert list in lieu of record on appeal [Entry date 10/13/93] |
| 9/6/94 | Certified copy of judgment from USCA reversing and remanding the Decision of the District Court [Appeal [43-1] for further proceedings consistent with the opinion of this Ct. Costs taxed against appellee. All of the above in accordance with the opinion of this Ct. Attached. Costs taxed in favor of Appellants, Charles A. Thomas, et al., as follows: Brief $114.80; Appendix $34.80; Reply brief $58.90; Docketing Fee $100.00; TOTAL—$308.40. [Entry date 09/22/94] |
| 9/22/94 | Remark Doc #47 & case file & updated copy of docket sheet to Wmspt |
| 10/18/94 | ORDER by Judge Malcolm Muir: case placed on March 1995 trial list [Entry date 10/20/94] |

| DATE | PROCEEDINGS |
|---|---|
| 11/14/94 | MOTION by defendant North Star Steel to continue dates listed in Court's scheduling Order of 10/18/94 for placing matter on trial list and for filing dispositive motions; C/S; Propo. [Entry date 11/15/94] [Edit date 11/15/94] |
| 11/15/94 | REMARK—Doc. #49 sent to Wmspt |
| 11/17/94 | ORDER by Judge Malcolm Muir: granting motion to continue dates listed in Court's scheduling Order of 10/18/94 for placing matter on trial list and for filing dispositive motions [49-1]; time for filing dispositive motions shall expire 30 days after US Supreme Court enters final order w/respect to North Star's petition for writ of cert |

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 93-7613

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THOMAS, *et al.*

v.

NORTH STAR STEEL CO., INC.

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**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 9/15/93 | CIVIL CASE DOCKETED. Notice filed by Charles A. Thomas, Darren S. Boop, Wayne D. Orner, Gerald W. Ranck, Harold E. Van Sickle, Richard A. Winter and Eugene L. Witmer. |
| 9/15/93 | CLERK'S LETTER to counsel advising appeal has been listed for possible dismissal due to jurisdictional defect. |
| 9/23/93 | RESPONSE by Paul Alan Levy, Esq. to clerk's letter for possible dismissal due to jurisdictional defect, filed. |
| 9/23/93 | RESPONSE by Vincent Candiello to clerk's letter for possible dismissal due to jurisdictional defect, with service, filed. |
| 9/30/93 | BRIEFING NOTICE ISSUED. Appellant brief and appendix due 11/9/93. |
| 10/7/93 | CLERK'S LETTER to counsel advising that jurisdictional defect will not be submitted at this time, responses will be sent to the merits panel, etc. SEND TO MERITS PANEL |

| DATE | PROCEEDINGS |
|---|---|
| 11/9/93 | MOTION filed by Oil Chem Atomic, UMWA, NLG Sugar Law Center and Intl Union United for leave to file amicus curiae brief in support of Appellants. Certificate of Service dated 11/9/93. |
| 11/9/93 | BRIEF on behalf of Appellant Charles A. Thomas, Appellant Darren S. Boop, Appellant Robert W. Bower, Appellant William D. Bridge, Appellant James Clingan, Appellant Neal B. Housner, Appellant Jonathan L. Noaker, Appellant Wayne D. Orner, Appellant Gerald W. Ranck, Appellant Harold E. Van Sickle, Appellant Richard A. Winter, Appellant Eugene L. Witmer, Pages: 36, Copies: 10, Delivered by mail, filed. Certificate of service date 11/9/93. |
| 11/9/93 | APPENDIX on behalf of Appellant Charles A. Thomas, Appellant Darren S. Boop, Appellant Robert W. Bower, Appellant William D. Bridge, Appellant James Clingan, Appellant Neal B. Housner, Appellant Jonathan L. Noaker, Appellant Wayne D. Orner, Appellant Gerald W. Ranck, Appellant Harold E. Van Sickle, Appellant Richard A. Winter, Appellant Eugene L. Witmer Copies: 4 Volumes: 1, Delivered by mail, filed. Certificate of service date 11/9/93. |
| 11/30/93 | AMICUS BRIEF on behalf of Oil Chemical and Atomic Workers, et al., Pages: 20, Copies: 10, Delivered by mail, filed. Certificate of service date 11/9/93. See 11/30/93 Order. |
| 11/30/93 | ORDER (Greenberg, Authoring Circuit Judge) granting motion by the Oil, Chemical and Atomic Workers Int. Union, etc., for leave to file an amici curiae brief in support of appellants. This order does not grant the amici the right to participate in oral argument if there is oral argument as that is determined by the merits panel, filed. |

| DATE | PROCEEDINGS |
|---|---|
| 12/9/93 | BRIEF on behalf of Appellee N Star Steel Co Inc, Pages: 41, Copies: 10, Delivered by mail, filed. Certificate of Service date 12/9/93. |
| 12/14/93 | MOTION filed by Chamber Commerce US for leave to file brief amicus curiae in support of Appellee. Certificate of Service dated 12/9/93. |
| 12/23/93 | REPLY BRIEF on behalf of Appellants, Copies: 10, Delivered by mail, filed. Certificate of service date 12/23/93. |
| 12/28/93 | ORDER (Greenberg, Authoring Judge and Circuit Judge) granting motion by Chamber of Commerce of the USA for leave to proceed as amicus curiae in support of Appellee. This order does not include the right to present oral argument as the merits panel decides that point, filed. |
| 12/28/93 | AMICUS BRIEF on behalf of US Chamber Commerce, Pages: 12, Copies: 10, Delivered by mail, filed. Certificate of service date 12/9/93. See 12/28/93 Order. |
| 12/28/93 | APPEARANCE from Attorney Robin S. Conrad on behalf of Amicus-appellee Chamber Commerce US, filed. |
| 1/13/94 | APPEARANCE from Attorney Cynthia S. Akers and Joseph S. Hornack on behalf of Amici-Appellants Guild/Sugar Law Center for Economic and Social Justice, Oil Chemical & Atomic Workers International Union & United Mine Workers of America, filed. |
| 3/1/94 | CALENDARED for Tuesday, May 24, 1994. |
| 5/24/94 | ARGUED 5/24/94 Panel: Cowen, Roth, Circuit Judges and Ackerman, District Judge. |
| 8/10/94 | OPINION (Cowen, Roth, Circuit Judges and Ackerman, Authoring Judge, District Judge), filed. |

| DATE | PROCEEDINGS |
|---|---|
| 8/10/94 | JUDGMENT, the judgment of the district court entered August 26, 1993 is REVERSED. The cause is REMANDED to the district court for further proceedings consistent with the opinion of this court. Costs taxed against appellee, filed. |
| 8/15/94 | BILL OF COSTS filed by Appellants Charles A. Thomas et al. Certificate of service dated 8/12/94. |
| 9/1/94 | MANDATE ISSUED, filed. |
| 10/20/94 | REPORTER at 32 F.3d: 53. |
| 11/14/94 | Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee N Star Steel Co Inc. Filed in the Supreme Court on 11/7/94 at Supreme Ct. case number: 94-834. |
| 1/13/95 | U.S. Supreme Court order dated 1/6/95 at S.C. number: 94-834, granting petition for writ of certiorari by Appellee N Star Steel Co. Inc. This case is consolidated with S.CT. No. 94-835, Crown Cork & Seal Co., Inc. v. United Steelworkers of America, AFL-CIO-CLC and a total of one hour is allotted for oral argument, filed. |

[Filed May 25, 1993]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

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Case Number: 4:CV-92-1507
(Judge Muir)

CHARLES A. THOMAS, *et al.*

v.

NORTH STAR STEEL COMPANY, INC.

---

**JUDGMENT IN A CIVIL CASE**

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of the Defendant North Star Steel and against the Plaintiffs.

Date: May 25, 1993

LANCE S. WILSON
Clerk

/s/ Barbara Poust
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

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(Title Omitted in Printing)

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**CERTIFICATE OF SERVICE**

I, MARGARET L. MARKLE, ESQUIRE, hereby certify that I served two true and correct copies of the Motion to Vacate Judgment Pursuant to Fed. R. Civ. P. 59(e) upon the counsel named below by placing same in the United States Mail, First Class, Postage Prepaid, this 8th day of June, 1993.

Vincent Candiello, Esquire
One Commerce Square
417 Walnut Street
Harrisburg, PA 17101-1904

RUDNITSKY & HACKMAN, P.C.

By: Margaret L. Markle
MARGARET L. MARKLE, ESQUIRE
Attorney No. 46658
Attorney for Plaintiffs
9 Courtyard Offices
Selinsgrove, PA 17870
(717) 743-2333

[Filed Sep. 3, 1993]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
WILLIAMSPORT DIVISION

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(Title Omitted in Printing)

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**NOTICE OF APPEAL**

All plaintiffs in this case, including but not limited to Charles A. Thomas, Darren S. Boop, Robert W. Bower, William D. Bridge, James Clingan, Neal B. Housner, Jonathan L. Noaker (whose name is misspelled in some pleadings as "Nooker"), Wayne D. Orner, Gerald W. Ranck, Harold E. Van Sickle, Jr., Richard A. Winter, and Eugene L. Witmer, Sr., appeal from the judgment dismissing this action and from the orders dismissing their action and denying reconsideration dated, respectively, May 25, 1993, and August 26, 1993.

Respectfully submitted,

/s/ Paul Alan Levy
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Public Citizen Litigation Group
Suite 700
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/s/ Karen Hackman
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(717) 743-2333

Attorneys for Plaintiffs-Appellants

August 31, 1993

**[LETTER TO CHARLES THOMAS]**

NORTH STAR STEEL PENNSYLVANIA
230 Lower Market Street, Milton, PA
Telephone (717) 742-7661

August 20, 1992

Mr. Charles A. Thomas
R.D. #1, Box 1107
Lewisburg, PA 17837

Dear Charlie:

As you know, North Star Steel Company's ("NSS") Milton plant has been temporarily shut down since March 1, 1991. This shutdown has resulted in numerous lay-offs which we initially hoped were temporary in nature. We now realize that a number of positions will be eliminated on a permanent basis. We regret to inform you that your position in one of these. The effective date of your separation from NSS service is September 1, 1992.

You will be paid severance in accord with the NSS/Cargill Severance Pay Policy. The severance pay will be calculated by using the lesser of your years of service, or eight years two months, since Milton Manufacturing Company was formed on January 1, 1983 and the lay-off commenced on March 1, 1991.

All NSS employee benefit coverages will cease effective September 1, 1992. You have the right to elect to continue your health and dental coverages, for a period of 18 months, under COBRA at 102% of the actual group coverage rates (not the employee rate). You must make your election within 60 days (by October 30, 1992) of your election of coverage. Premium payments must be made within 45 days (by December 14, 1992) of your election of coverage. A failure to make an election or to make the required initial premium payment will result in termi-

nation of your health and dental coverage effective September 1, 1992.

Please contact Robin Johnson at 742-7661 if you have any questions.

Thank you for your past service and best of luck in your future endeavors.

Regards,

/s/ Harold Olden
HAROLD OLDEN
General Manager

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

---

(Title Omitted in Printing)

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**AFFIDAVIT OF CHARLES A. THOMAS**

Charles A. Thomas, being first duly sworn, deposes and says as follows:

1. I was employed by North Star Steel Company, Inc., as Purchasing Manager at its Milton, Pennsylvania facility from 1988, when this company purchased the facility, until I was laid off on February 25, 1991. I had been employed at this facility continuously since 1960, under successive owners.

2. I occupied a salaried, non-bargaining unit position. Other non-union, salaried positions included foremen, clerks, supervisors, managers, and others. Production workers were represented by the Steelworkers Union.

3. Altogether, approximately 320 persons were employed at the Milton, Pennsylvania production facility in late 1990-early 1991, to the best of my recollection, nearly all of them on full-time active status.

4. The Milton, Pennsylvania production facility consists of a melt shop and casting area, a rolling mill and attached storage/shipping area, a machine shop, and other areas related to maintenance, and the facility's main offices. These are all located in one geographical area; a scrapyard is located about three blocks from the plant.

5. On February 25, 1991, at approximately 9:30 a.m., without explaining why, Harold Olden, General Manager, told me to contact our suppliers to place our purchase or-

ders "on hold." At approximately 10:30 a.m., I was advised to report to the training room at 11:45 a.m. for a meeting. I did so and found most of the salaried employees present. No one had been informed of the purpose of the meeting.

6. Harold Olden, the General Manager, came into the training room at approximately 11:55 a.m. He stated that due to economic reasons, North Star Steel, Milton, was ceasing all production immediately and all salaried employees in the room were laid off indefinitely, effect as of now, and anyone could leave the room right now. When someone asked how long the layoff would last, he said he didn't know but would keep employees informed. The meeting lasted approximately five minutes and most of the people left immediately. I returned to my office to complete the task of calling suppliers, and I left the plant at about 2:00 p.m.

7. I later learned from speaking with co-workers that a meeting was held upstairs prior to our meeting with supervisors who would not be laid off. Another meeting was held in a separate room for salaried clerical employees who would continue to work until their jobs were complete. Also, at approximately the same time, meetings were conducted throughout the plant in which the union workers were told of the immediate, indefinite shut down. To the best of my knowledge, all but twelve union employees were laid off at this time.

8. In the weeks and months which followed, I stopped by the plant on three or four occasions to try to learn whether the company planned to reopen or whether the company would issue severance payments. I did not receive any answer except that the company was not prepared to pay severance benefits.

9. Finally, I began writing letters to North Star management and to Cargill Management asking about sever-

ance pay and W.A.R.N. damages. I got a reply in May, 1992, indicating that the company would pay what it was obligated to pay after company lawyers had reviewed the Court's opinion in the union's case against the company. A true copy of Cary Humphries' May 21, 1992 letter to me is appended hereto as Attachment A.

10. In July 1992, I was able to retain an attorney who wrote, at my direction, to Cary Humphries at Cargill demanding payment of W.A.R.N. damages. My attorney received a reply from Cargill's Law Department dated August 21, 1992, which she made available to me. A true copy of that letter is appended hereto as Attachment B.

11. In August 1992, I received a termination notice and severance pay. In January 1993, I received an additional amount of severance pay to correct an error.

12. I received my regular semi-monthly salary on the last day of February 1991. I received vacation pay in 1991 and 1992. Also, I continued to receive my health and other insurance benefits until my termination effective September 1, 1992.

13. To the best of my knowledge, other laid off, salaried employees received vacation pay and other benefits in the same manner as I did. To this day, none of us have received any W.A.R.N. damages.

Further affiant sayeth naught.

/s/ Charles A. Thomas
CHARLES A. THOMAS

(Notary Omitted in Printing)

ATTACHMENT A

CARGILL
15407 McGinty Road West
Wayzata, MN 55391-2399
Mail Address: PO Box 9300
Minneapolis, MN 55440-9300

May 21, 1992

Mr. Charles A. Thomas
P.O. Box 204
Lewisburg, PA 17837

Re: Your Letter of April 15, 1992

Dear Charles:

As promised, this is in response to your letter to Mr. MacMillan dated April 15, 1992.

At the time the NSS Milton plant was shut down, we had all hoped the work stoppage would be the temporary result of difficult economic times for the steel industry. As of this date, we are still uncertain as to the economic feasibility and viability of reopening the Milton plant.

The uncertainty surrounding the final determination of the Milton plant does have an effect on your severance question. NSS does not pay severance where there is a temporary layoff. However, once the layoff is permanent, salaried employees receive severance in accord with the Cargill Severance Pay Plan which is outlined in the Cargill Salaried Employees Handbook. Past service credit is honored in determining the severance amount unless you received severance pay from the predecessor company when NSS purchased Milton Manufacturing. Therefore, once the decision on the Milton plant is final, you will be contacted either about returning to work or your severance pay, as applicable.

Your question on the 60-day WARN Act pay is more difficult to respond to, given the uncertainty relating to the interpretation of the judge's opinion in this case. Company lawyers are currently reviewing the opinion. However, I can tell you that if NSS is required to pay consideration above and beyond the severance pay payable to affected Milton workers, we would include salaried employees in that group.

I know that the period of uncertainty is frustrating to all of us. We will be getting back to you and your coworkers once the final decision is made concerning the Milton plant.

Sincerely,

/s/ Cary Humphries
CARY HUMPHRIES
CH/FLB/dcw
ci/3326

Attachment B

CARGILL, INCORPORATED
LAW DEPARTMENT

P.O. Box 9300
Minneapolis, MN 55440

August 21, 1992

Writer's Direct Dial Number
(612) 475-5377

Ms. Karen L. Hackman
Rudnitsky & Hackman, P.C.
9 Courtyard Offices, Suite 130
Routes 11-15
Selinsgrove, PA 17870

Re: NSS Milton Plant

Dear Ms. Hackman:

This is in response to your earlier letter concerning the WARN Act and its applicability to salaried employees at North Star Steel Co.'s (NSS) Milton, Pennsylvania facility.

We are aware that the WARN Act applies to both salaried and hourly employees. It is the intent of NSS to provide WARN benefits to salaried employees in the same manner that it provides said benefits to hourly employees. Unfortunately, Judge Muir's ruling has left some interpretive gaps which must be decided by the District Court before benefits are paid. These include the appropriate calculation of WARN Act benefits and appropriate offsets to these benefits. A tentative hearing is scheduled at the end of September to deal with these issues. Once a final interpretation is rendered, salaried employees will be provided WARN benefits on the same basis as their hourly counterparts, consistent with Judge Muir's ruling.

Sincerely,

/s/ Frederick L. Budde
FREDERICK L. BUDDE

FLB: jh
cil/3473

cc: J. Smythe/NSS/51
C. Humphries/Admin/Lake

SUPREME COURT OF THE UNITED STATES

---

Nos. 94-834, 94-835

NORTH STAR STEEL CO.

v.

THOMAS, CHARLES, *et al.*

---

CROWN CORK & SEAL CO., INC.

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

---

Friday, January 6, 1995

---

The petition for writ of certiorari is granted. The case is consolidated and a total of one hour is allotted for oral argument.

FILED
FEB 21 1995
OFFICE OF THE CLERK

(3)

No. 94-834

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

---

NORTH STAR STEEL COMPANY,
*Petitioner,*

v.

CHARLES A. THOMAS, *et al.*,
*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

---

## BRIEF FOR THE PETITIONER

---

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## QUESTION PRESENTED

Whether, in actions brought under the federal Worker Adjustment and Retraining Notification Act, the applicable limitations period should be drawn from Section 10(b) of the National Labor Relations Act rather than state law.

## PARTIES TO PROCEEDINGS BELOW AND RULE 29.1 STATEMENT

### *Petitioner/Defendant Below*

North Star Steel Company is a wholly-owned subsidiary of Cargill, Inc., which is a privately-held corporation. None of Cargill's shareholders are themselves publicly-traded entities.

### *Respondents/Plaintiffs Below*

Respondents are Charles A. Thomas; Darren Boop; Robert W. Bower; William D. Bridge; James Clingan; Neil B. Housner; Jonathan L. Noaker; Wayne D. Orner; Gerald W. Ranck; Harold E. Van Sickle, Jr.; Richard A. Winter; and Eugene L. Witmer, Sr.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-834

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NORTH STAR STEEL COMPANY,
*Petitioner,*

v.

CHARLES A. THOMAS, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 32 F.3d 53. The decision of the district court (Pet. App. 17a-25a) is reported at 838 F. Supp. 970. A further decision of the district court (Pet. App. 26a-28a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 10, 1994. (Pet. App. 1a-16a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

The Worker Adjustment and Retraining Notification Act ("Warn" or "the "Act"), 29 U.S.C. § 2101 *et seq.*, is set forth at Pet. App. at 29a to 37a. Section 10(b) of

the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is set forth at Pet. App. at 38a.

## STATEMENT OF THE CASE

For many years, Petitioner North Star Steel Company ("North Star") operated a steel plant in Milton, Pennsylvania. On February 25, 1991, North Star ceased operations at the facility and laid off its workforce, an event that constituted a "plant closing" under WARN. Twenty months after the closing, Respondents, who are twelve former salaried employees at the plant, brought suit alleging that they did not receive sufficient advance notice of their layoff as required by WARN. North Star defended the claim on the ground that Respondents' action is time-barred. Because the WARN statute itself does not specify a limitations period, the question presented is whether the six-month limitations period contained in the NLRA should be borrowed for WARN claims, in which case Respondents' claims would be barred, or whether some unspecified limitations period should be borrowed from state law, in which case Respondents' claims presumably would survive.

1. *The Statutory Framework.* After years of often acrimonious debate, Congress enacted WARN on August 4, 1988, to provide "workers, their families and communities" with advance written notice of impending "plant closings" and "mass layoffs."[1] *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a) (1994); 134 Cong. Rec. 15923 (1988). Under WARN, an employer must notify both its

[1] WARN generally defines a "plant closing" as a shutdown of a single site of employment, or an operating unit at a site of employment, that results in an actual or expected employment loss of six months for 50 or more full-time employees. *See* 29 U.S.C. § 2101(a)(2). A "mass layoff" is a reduction in force, other than a plant closing, that results in an actual or expected employment loss of six months for at least 33 percent of the employees at an employment site (provided that at least 50 individuals suffer such an employment loss) or 500 employees. *See* 29 U.S.C. § 2101(a)(3).

affected employees (or their union representatives) and local government sixty days prior to an employment loss. *Id.* An employer who implements a plant closing or mass layoff without providing the requisite notice may be held liable to each employee for lost wages and benefits for each day of violation up to sixty days. 29 U.S.C. § 2101 (a)(6). No additional remedy, other than attorney's fees for a successful plaintiff, are available to employees under WARN. 29 U.S.C. § 2104(b).

To obtain the remedy provided by statute, aggrieved employees (or their representatives) may bring suit in "any district court of the United States [where] the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. §§ 2104(a)(5)-(6). Although WARN provides for such actions, it does not include an express statute of limitations.

2. *The North Star Plant Closing and Related Litigation.* Respondents' claim was not the first round of WARN litigation to arise from the February 25, 1991 shutdown of the Milton plant. On September 9, 1991, the United Steelworkers of America ("USWA"), a union representing approximately 250 former employees of the facility, timely filed suit on behalf of its members alleging that North Star failed to provide it or them with sufficient notice of the closing. On April 9, 1992, the same district court involved here awarded USWA summary judgment on liability holding, in part, that the layoff constituted a "plant closing" violative of WARN. In a separate order dated December 11, 1992, the district judge determined the number of days for which the company was required to pay WARN damages. *United Steelworkers v. North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992), *aff'd in relevant part*, 5 F.3d 39 (CA3 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

Respondents, twelve salaried employees at the Milton plant, were unrepresented by USWA and, thus, not specifically involved in the *United Steelworkers* litigation.

However, on October 22, 1992, more than six months after the district court's determination of a violation and more than twenty months after the layoff occurred, Respondents filed this action in the United States District Court for the Middle District of Pennsylvania seeking to collect their own WARN damages against North Star.

3. *The Proceedings Below.* On April 1, 1993, North Star moved for summary judgment against Respondents on the ground that their action was time-barred. Noting that WARN itself contained no statute of limitations, North Star argued that the court should borrow the six-month limitations period set forth in Section 10(b) of the NLRA. Respondents argued that their complaint was timely because the court, instead, should borrow a longer statute of limitations from state law, such as the three-year limitations period contained in the Pennsylvania Wage Payment and Collection Law.

On May 25, 1993, the district court granted North Star summary judgment. Applying *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the trial judge determined that the NLRA provided a closer analogy to WARN than any available state statute and that the federal policies at stake and the practicalities of litigation made it appropriate to borrow the NLRA limitations period.

Respondents' appeal to the Third Circuit was consolidated with the appeal of Crown Cork & Seal Co., an employer which had been unsuccessful in asserting the Section 10(b) limitations period in a WARN action in the Eastern District of Pennsylvania. *United Steelworkers v. Crown Cork & Seal Co.*, 833 F. Supp. 467 (E.D. Pa. 1993), *aff'd*, 32 F.3d 53 (CA3 1994), *cert. granted*, No. 94-835, 1995 WL 3914 (Jan. 6, 1995) (unreported) (consolidated with the instant case). In reversing the judgment for North Star and affirming the ruling against Crown Cork, the court of appeals held that an unspecified state statute of limitations, rather than the NLRA, should

govern WARN actions. Although it acknowledged that "none of the possible state laws provide perfect analogies to WARN," that "courts have looked to NLRA cases in interpreting WARN," and "that there are some definitional overlaps" between the two federal statutes, it nonetheless interpreted *DelCostello* to require application of a state limitations period. Pet. App. 10a. The Third Circuit reached this decision despite being unwilling—or perhaps unable—to decide which of a multitude of possible state limitations periods actually would control WARN actions in Pennsylvania.

4. *The Split Among the Circuits.* The Third Circuit's ruling in this case is in accord with the Second Circuit's earlier holding in *United Paperworkers International Union, Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (CA2 1993), a decision that also concluded WARN is not sufficiently analogous to the NLRA to warrant application of a federal limitations period.

Two weeks after the Third Circuit issued its opinion, however, a panel of the Fifth Circuit, under virtually identical factual circumstances, reached the opposite conclusion as to the appropriate limitations period for WARN. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204 (CA5 Sept. 22, 1994 (unreported)). In affirming a series of lower court rulings that adopted Section 10(b) as the proper limitations period for WARN, the court noted "the necessity for a uniform limitations period for WARN claims" and found the NLRA to be "a *closer analogy* than available state statutes." 31 F.3d at 233 (citing *DelCostello*, 462 U.S. at 171-72) (emphasis in original).

Just two months after *Halkias* was decided, the Sixth Circuit also borrowed the NLRA limitations period for WARN. *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850 (CA6 1994). The Sixth Circuit affirmed a district court's application of the Section 10(b) limitations period, finding that "section 10(b) of the NLRA provides

the more analogous limitations provision and better effectuates the policies underlying WARN . . . ." 38 F.3d at 856. Echoing the reasoning of the *Halkias* court, the Sixth Circuit expressly rejected the holding and rationale of the *Crown Cork* and *Specialty Paperboard* rulings. *See Peabody Coal,* 38 F.3d at 855; *Halkias,* 31 F.3d at 228.

## SUMMARY OF ARGUMENT

I. WARN, like many federal laws, fails to contain an express statute of limitations. Rejecting the notion that claims arising under such statutes should last indefinitely, this Court traditionally has attempted to borrow analogous limitations periods from state law. However, "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking," federal limitations periods are applied instead. *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 172 (1983).

In rejecting North Star's contention that the WARN limitations period should be borrowed from Section 10(b) of the NLRA, rather than from state law, the court of appeals severely misapplied the *DelCostello* standard. The Third Circuit failed to acknowledge the need for federal uniformity, failed to recognize the similarity in purpose and structure between WARN and the NLRA, and failed to appreciate how the long-standing federal policy favoring quick resolution of employment disputes is fully applicable to WARN.

Because WARN is a unique federal statutory creation without analogy in state law, the lower courts that have attempted to borrow a state limitations period understandably have failed to agree on which kind of limitations should apply. This resulting lack of uniformity has resulted in intolerable uncertainty and time-consuming litigation. *See Peabody Coal,* 38 F.3d at 855-56. Without

adoption of a uniform federal limitations period, such wasteful litigation undoubtedly will proliferate, given the interstate nature of many WARN claims and the nearly limitless opportunities for forum shopping that WARN's expansive venue provision provides. *Id.*

That the NLRA clearly provides a suitable analogy to WARN can hardly be questioned. Both statutes serve a similar purpose: to protect workers and their communities from managerial practices that are inimical to the general welfare. 29 U.S.C. § 141(b); 20 C.F.R. § 639.1 (a) (1994). Moreover, both statutes impose parallel layoff notification requirements on employers and are structurally similar. Indeed, the text of WARN incorporates several key provisions from the NLRA, and both judicial decisions and interpretative regulations under WARN have borrowed extensively from the NLRA. *Peabody Coal,* 38 F.3d at 856.

Finally, the Third Circuit's decision overlooks the longstanding federal interest in speedy resolution of employment disputes—a policy fully applicable to WARN. *Halkias,* 31 F.3d at 238. WARN's legislative history indicates that Congress intended to provide a system for *prompt* assistance to dislocated workers. S. Rep. No. 62, 100th Cong., 1st Sess. 2 (1987). This purpose is reflected in the Act's remedial provisions, which limit damages for each affected employee to sixty days' wages and benefits. 29 U.S.C. § 2104(a)(1)(B). Moreover, given that WARN applies only to employers who are shutting down or significantly curtailing their operations, adoption of a short limitations period has the practical effect of severely impeding if not preventing litigation after records have been lost and witnesses and claimants scattered. *Halkias,* 31 F.3d at 238.

Because fundamental *DelCostello* criteria favoring federal borrowing were misapplied, and a wasteful and inappropriate policy applying state law was adopted instead, the judgment of the Third Circuit should be re-

versed, and the judgment of the district court dismissing the complaint should be reinstated.

II. Although the *DelCostello* framework establishes the applicability of the NLRA limitations period to WARN, the Court should re-examine the wisdom of its limitations borrowing doctrine. That doctrine originated last century, when the federal judiciary began borrowing state limitations periods for "silent" federal statutes under the supposed command of the Rules of Decision Act. *McCluny v. Silliman*, 3 Pet. (28 U.S.) 270 (1830). Although the role of the Rules of Decision Act in assertedly compelling such borrowing has been discredited, *DelCostello*, 462 U.S. at 159 n.13, the practice of borrowing state law has not. Without revisiting the issue as a matter of first principle, the Court has premised such continued borrowing on the view that Congress "intends by its silence that we borrow state law." *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987).

After the recent passage of a "fallback" statute of limitations period for future federal legislation, 28 U.S.C. § 1658, however, Congress no longer is silent on this issue. Rather, Congress has declared that the Court's existing practice of state-law borrowing "lack[s] persuasive support as a matter of policy," 136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990); *see also* H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990). Specifically, Congress has noted that the current practice imposes costly "uncertainty upon litigants," "undesirable variance among the federal courts," and "disrupts the development of federal doctrine on the suspension of limitations periods." H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990).

All of these perceived flaws in the current borrowing doctrine—which are recognized by courts and commentators—could be cured by adoption of a policy under which only federal law would be used to determine most, if not all, federal limitations periods. Under such a sys-

tem, the applicability of the six-month NLRA limitations period to the present action would be beyond dispute, since the NLRA is clearly the federal statute most analogous to WARN.

## ARGUMENT

### I. THE COURT'S ESTABLISHED BORROWING DOCTRINE DIRECTS THAT THE NLRA, AND NOT STATE LAW, SHOULD BE USED TO SUPPLY THE WARN LIMITATIONS PERIOD.

#### A. Federal Law Provides An Appropriate Vehicle For Interstitial Lawmaking.

WARN is not alone among federal statutes in failing to provide an explicit limitations period. *See Reed v. United Transp. Union*, 488 U.S. 319, 323 (1989) ("Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action."). When confronted with such circumstance, this Court generally assumes that Congress did not intend to allow potential claims to last indefinitely. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams v. Woods*, 2 Cranch (6 U.S.) 336, 342 (1805)) ("A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' "). Rather, this Court further assumes that Congress intends the judiciary to bridge the legislative gap by "borrowing" a limitations period from a comparable statute. *Agency Holding Corp.*, 483 U.S. at 147.

For many decades, this Court interpreted the Rules of Decision Act as permitting limitations borrowing only from state law.[2] *See, e.g., Campbell v. City of Haverhill*, 155 U.S. 610 (1895); *McCluny v. Silliman*, 3 Pet. (28

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[2] Rules of Decision Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (now codified with minor changes at 28 U.S.C. § 1652). The Rules of Decision Act originally provided: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." *Id.*

U.S.) 270 (1830). In more recent times, however, the Court has rejected the notion that the Rules of Decision Act mandates the application of state limitations periods to claims arising under federal statutes that are silent on the limitations issue. *DelCostello*, 462 U.S. at 160 n.13 (rejecting reliance "on a few turn-of-the-century cases suggesting that the Rules of Decision Act compels application of state limitations periods"). Later Court decisions have concurred in this view. *See, e.g., Agency Holding Corp.*, 483 U.S. at 147.

In place of the supposedly unyielding command of the Rules of Decision Act, *DelCostello* substituted a doctrine that continues the preference for absorbing state statutes but acknowledges the wisdom of borrowing limitations periods from federal law in appropriate cases. As the Court observed, "[s]tate legislatures do not devise their limitations periods with national interests in mind," and, thus, "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." 462 U.S. at 161 (quoting *Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n*, 432 U.S. 355, 367 (1977) (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975)). In furtherance of this principle, the Court redefined the standard for federal limitations borrowing as follows:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we [will] not hesitate[] to turn away from state law.

*DelCostello*, 462 U.S. at 172. The Court described the continued preference for borrowing state statutes as "a sort of fallback rule of thumb." *Id.* at 160 n.12.

Following this approach, the *DelCostello* Court applied the six-month limitations period contained in Section 10(b) of the NLRA to a "hybrid" Section 301/duty of

fair representation claim brought by an employee against both his employer and his collective bargaining representative. 462 U.S. at 165. Subsequently, the six-month NLRA standard has been applied to claims arising under other federal labor laws that contain no limitations period. *See, e.g., West v. Conrail,* 481 U.S. 35 (1987) (applying Section 10(b) to Railway Labor Act); *Haggerty v. USAir, Inc.,* 952 F.2d 781 (CA3 1992) (Section 10(b) applied to worker dislocation provisions contained in Airline Deregulation Act); *Aluminum, Brick & Glassworkers Int'l Union Local 674 v. A.P. Green Refractories, Inc.,* 895 F.2d 1053, 1054-55 (CA5 1990) (NLRA period applied to "pure" Section 301 action under Labor Management Relations Act).

In *Agency Holding Corp.,* 483 U.S. 143 (1987), the Court expanded and refined the *DelCostello* borrowing doctrine in a case outside the labor field. The issue was whether state or federal law should provide the limitations period for the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Before reaching this ultimate question, the Court suggested an initial inquiry to be added to the *DelCostello* framework—one that focused on whether a uniform limitations period, of either state or federal law, was necessary "to avoid intolerable 'uncertainty and time-consuming litigation.' " *Id.* at 150 (quoting *Wilson v. Garcia,* 471 U.S. at 272). Given the difficulty of analogizing RICO actions to existing state statutes —and the danger that the multistate nature of RICO claims might lead to forum shopping—the Court found it wise to impose such uniformity. It then chose to borrow the limitations period contained in the Clayton Antitrust Act, concluding that this federal statute provided a "far closer analogy . . . than any state law alternative," and noting the "similarities in purpose and structure" between the two statutes. *Id.* at 150, 152.

In its most recent borrowing decision, the Court also found a federal limitations period to be applicable, this

time to claims brought under Section 10(b) of the Securities Exchange Act. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991). The Court's four-member plurality—whose mode of analysis (though not its result) appears to have been accepted by Justice O'Connor and Justice Kennedy in dissent[3]—suggested a three-tiered "hierarchical" approach to the *DelCostello* doctrine. *Id.* at 356-57. First, "the court must determine whether a *uniform* statute of limitations is to be selected," regardless of whether the limitations period is to be drawn from state or federal law. *Id.* at 357 (emphasis added). Second, "assuming a uniform limitations period is appropriate, the court must [then] decide whether this period should be derived from a state or a federal source," paying particular attention to the "geographic character of the claim" and "the danger of forum shopping." *Id.* Finally, if a federal limitations period satisfies the first two criteria, the court must then determine whether "an analogous federal source truly affords a 'closer fit' with the cause of action at issue than does any available state-law source." *Id.*

### B. The Third Circuit Misapplied *DelCostello* And Its Progeny.

Although much of the above precedent was cited in the Third Circuit's decision, it largely was misapplied. The court of appeals failed to give sufficient weight to the need for a uniform WARN limitations period, failed to recognize the similarities in purpose and structure between WARN and the NLRA, and failed to consider how the long-standing federal policy favoring quick resolution of labor and employment disputes applies to WARN. All

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[3] Justice O'Connor and Justice Kennedy dissented only as to the details of the federal limitations period to be applied in *Lampf* and its retroactive application in light of longstanding, contrary judicial precedent—issues not presented in the context of WARN. *Lampf,* 501 U.S. at 369 (O'Connor, J., dissenting), 501 U.S. at 374 (Kennedy, J., dissenting).

of these criteria make the NLRA, and not state law, the most appropriate vehicle for interstitial lawmaking here.

### 1. *WARN requires a uniform limitations period, which only can be achieved by borrowing from federal law.*

As this Court repeatedly has found, "'[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.'" *Wilson,* 471 U.S. at 266 (quoting *Chardon v. Fumero Soto,* 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). With this precept in mind, the Court has not hesitated to establish a uniform statute of limitations—borrowed from an analogous federal law—when reliance on "traditional" state-law borrowing would result in "intolerable 'uncertainty and time-consuming litigation.'" *Agency Holding Corp.,* 483 U.S. at 150 (quoting *Wilson,* 471 U.S. at 272). The Court most often reaches this result when a federal statute's *sui generis* nature, multistate character, and broad venue provision make analogy to state law difficult—and hence increase the likelihood for conflicting lower court rulings and resulting forum-shopping opportunities. *See Agency Holding Corp.,* 483 U.S. at 154 ("With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would virtually guarantee complex and expensive litigation over what should be a straightforward matter.") (citation omitted).[4]

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[4] Although a uniform limitations period seems to be a generally desirable objective, the Court has determined that, in limited circumstances, federal policy is not better served by such uniformity. The initial inquiry, therefore, is whether all claims arising out of a statute "'should be characterized the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.'" *Agency Holding Corp.,* 483 U.S. at 143 (quoting *Wilson,* 471 U.S. at 268). Given the obvious similarities in WARN litigation, there exists no suggestion in any reported case or comment that the limitations period for WARN should vary based upon the factual issues presented in each case.

a. ***Because state law is not analogous to WARN, courts are unable to agree on which type of state limitations period to apply.***

The few existing attempts to analogize WARN to state causes of action only serve to underscore the need for federal uniformity. For example, while the Second Circuit in *Specialty Paperboard* determined Vermont's six-year statute of limitations for breach of contract actions should apply to WARN, 999 F.2d at 53, another court, likewise attempting to identify the most analogous state cause of action, applied a three-year residual limitations period to a WARN claim. *Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993).

Indeed, here, the Third Circuit acknowledged the possibility that four different Pennsylvania limitations periods might be appropriate for WARN, but refused to decide among them. Pet. App. 15a. *See also Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Servs., Inc.*, 830 F. Supp. 432, 435-37 (N.D. Ill. 1993) (refusing to choose between ten-year limitations period for written contracts, five-year period for oral contracts, or five-year catchall provision, noting that claim was timely under each); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 197 (E.D. Mich. 1993) (applying Michigan's six-year statute of limitations for contract actions).

After reviewing these unsuccessful efforts by its sister courts to agree on a type of state limitations period to apply, the Sixth Circuit rightfully concluded that federal uniformity was necessary to avoid the needless litigation that would result from strained attempts to analogize WARN to state law:

> The suggestions of possibly analogous limitations periods run the gamut from the catchall limitations period advocated here to those governing contracts or torts. Even the *Specialty Paperboard* and *Wallace* courts, which agreed that state contract limitations

> periods should apply, did so for divergent reasons. Add to these limitations periods, arguments that can be raised under state unemployment laws, state wage laws, state benefit laws, state plant closing laws, and the opportunites are endless. Thus, selecting a WARN limitations period implicates the same concerns for uniformity present in *Agency Holding Corp.*

*Peabody Coal*, 38 F.3d at 855-56.

b. ***The multistate nature of WARN claims makes a federal limitations period appropriate.***

In *Agency Holding Corp.*, the Court also noted that in situations when a federal statute frequently touches upon interstate transactions—such that a single alleged violation might lead to litigation over which state limitations period to apply—reliance on a uniform federal standard is appropriate. 483 U.S. at 153-54. Given the multistate nature of potential WARN claims, this factor also supports application of the NLRA limitations period to WARN.

Because WARN applies only to larger businesses, employing 100 or more employees, interstate concerns inevitably are implicated by the statute. *See* 29 U.S.C. § 2101(a)(1). Indeed, in circumstances where only a single facility is closed, it is possible, if not probable, that the decision to close that plant was made in another state, or that employees will be asked to transfer to facilities in other states. *See* 29 U.S.C. § 2101(b) (WARN implicated by transfers not within reasonable commuting distance). This geographic, multistate character of WARN's coverage militates strongly in favor of a uniform, national limitations period. *See Agency Holding Corp.*, 483 U.S. at 153-54.

Recent WARN litigation also demonstrates the likelihood—should state law apply—of expensive and time-consuming litigation in circumstances where an employer's single employment decision affects employees in dif-

ferent states. In *Halkias,* for example, General Dynamics' plant closing directly affected large numbers of employees in Texas, Oklahoma, and Missouri. The Fifth Circuit clearly was troubled by the prospect of having to determine which state limitations period would govern such a situation, or whether each group of employees would be covered by a different limitations period. *Halkias,* 31 F.3d at 237 ("Given the possibility for multistate WARN litigation, the issue of which state's limitations period should control might become an issue of time-consuming litigation.").[5]

c. *Application of state limitations periods would result in forum shopping.*

The danger of forum shopping is an equal if not more significant factor favoring adoption of a uniform federal limitations period. *See Lampf,* 501 U.S. at 357 (availability of forum shopping weighs heavily in favor of federal borrowing). In its decision, the Third Circuit summarily dismissed this concern, declaring that "workers will gain few advantages by suing in a court far from the site of injury." Pet. App. 13a (quoting *Specialty Paperboard,* 999 F.2d at 56). As *Halkias* and others have observed, however, this conclusion is completely erroneous.

WARN has an extraordinarily broad jurisdictional provision, which allows actions to be brought not only in "any district in which the violation is alleged to have occurred" but also in any district "in which the employer

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[5] Even had the *Halkias* court decided to apply a state limitations period and further determined that state contract law was most analogous to WARN, it still faced determining whether to apply a five-year limitations period in Missouri (Mo. Rev. Stat. § 516.120 (1)), a three- or five-year limitations period in Oklahoma (Okla. Stat. tit. 12, §§ 95(1), (2)), and/or a four-year limitations period in Texas (Tex. Civ. Prac. & Rem. Code Ann. § 16.004). The application of such divergent limitations periods to a single employment decision is inconsistent with the purpose of WARN as a national employment statute.

transacts business." 29 U.S.C. § 2104(a)(5). If state law were to govern the WARN limitations period, WARN plaintiffs who are untimely under their own state's statute could "shop"—perhaps years after their layoff—for a more favorable venue in which to pursue their action. Once there, it is extremely likely that their suit would be governed by the (presumably longer) limitations period of their "newly adopted" forum state. *See Halkias,* 31 F.3d at 237 (in "examining borrowing cases involving a conflict over which state's limitation period should apply, we find a consistent preference for borrowing the forum state's"); *Peabody Coal,* 38 F.3d 855 ("in today's national and international corporate environment," application of varying state limitations period would result in "limitless" opportunities for forum shopping).

Indeed, the Third Circuit so much as admitted this point when discussing North Star's companion case, *Crown Cork & Seal,* which involved a WARN claim brought in Pennsylvania for a layoff occurring in Perry, Georgia. In declining to decide whether Pennsylvania or Georgia law governed the Perry layoff, the court nevertheless acknowledged that "as a general rule the governing statute of limitations should be that of the state in which the federal court sits . . . ." Pet. App. 13a n.4 (quoting *Consolidated Express, Inc. v. New York Shipping Ass'n,* 602 F.2d 494, 507-08 (CA3 1979), *vacated on other grounds,* 448 U.S. 902 (1980)).[6]

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[6] *See also Vigman v. Community Nat'l Bank & Trust Co.,* 635 F.2d 455, 459 (CA5 1981) ("When federal law contains no limitations period applicable to a particular federal cause of action, federal courts are to apply the forum state's limitations period."); *Forrestal Village, Inc. v. Graham,* 551 F.2d 411, 413 (D.C. Cir. 1977) ("It is well established that when, as here, Congress has created a federal right but has not prescribed a limitation period for enforcement, federal courts will borrow the period of limitation prescribed by the state where the court sits"); *Vanderboom v. Sexton,* 422 F.2d 1233, 1236-37 (CA8) (Supreme Court cases "make it clear that when the federal legislative act is silent as to

Given this precedent, it is beyond cavil that borrowing state law to determine the WARN limitations period would provide extraordinarily fertile ground for forum shopping. Jurisdictions with little or no rational connection to the parties or to the triggering WARN event, but with long limitations periods, would become havens for litigating stale and otherwise time-barred claims. As there is no evidence that Congress intended such a perverse result, the Court should, for the reasons found applicable in *Lampf*, apply a uniform federal limitations period to WARN.

### 2. *The NLRA is a closer fit to WARN than any available state law source.*

In addition to these uniformity concerns, the Court has also concluded that reliance on a federal limitations period is appropriate when "an analogous federal source truly affords a 'closer fit' with the cause of action at issue than does any available state-law source." *Lampf*, 501 U.S. at 357. The Court often will seek to find "similarities in purpose and structure" between the two statutes to determine this relationship. *Agency Holding Corp.*, 483 U.S. at 152.

Although the Third Circuit undertook a perfunctory comparison of WARN and the NLRA, it mistakenly found insufficient similarities between the two federal statutes. Pet. App. 7a-15a. The court compounded its error by not even attempting to analogize WARN to proposed state statutes of limitations—an exercise perhaps abandoned due to the obvious dissimilarities between WARN and these provisions.

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the statute of limitations applicable to it, the limitations period of the forum state is applied."), *cert. denied*, 400 U.S. 852 (1970). *Cf. Ferens v. John Deere Co.*, 494 U.S. 516, 523-28 (1990) (In state law action for personal injury occurring in Pennsylvania, "transferee forum [of Pennsylvania was] to apply the law of the transferor court [of Mississippi]," even though "Mississippi's long limitation period no doubt drew plaintiffs to [that] State.").

a. *WARN and the NLRA impose parallel notification requirements on employers and are structurally similar.*

It cannot plausibly be contested that the policies and purposes of WARN and the NLRA overlap. The NLRA proscribes management practices "which affect commerce and are inimical to the general welfare." 29 U.S.C. § 141 (b). Similarly, WARN's purpose is to protect both individuals and communities from managerial practices that unexpectedly deprive large groups of workers of their livelihood. 20 C.F.R. § 639.1(a) (1994).

WARN and the NLRA also are the only two federal statutes which require employers to provide notice to their employees of impending plan closings and mass layoffs. As the Fifth Circuit correctly observed in *Halkias*, "[t]he NLRA is more than just analogous to WARN; in fact, WARN may be thought of as an outgrowth of the NLRA, because §§ 8(a)(1) and 8(a)(5) of the NLRA . . . [both] have been interpreted to require an employer to notify a union of its decision to close a plant." 31 F.3d at 232 (citing *Penntech Papers, Inc. v. National Labor Relations Bd.*, 706 F.2d 18, 26 (CA1) (NLRA requires employer to provide "timely notice to the union of the decision to close"), *cert. denied*, 464 U.S. 892 (1983)). *See also Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991) (NLRB imposes affirmative duties on employers resulting from decision to close plant), *review granted in part, enforcement granted in part, remanded*, 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed*, 114 S. Ct. 2157 (1994).

In addition to recognizing that WARN and the NLRA impose parallel requirements upon employers implementing workforce reductions, several courts have commented on the obvious structural similarities between the two federal statutes. " '[T]he family resemblance is undeniable, and indeed there is a substantial overlap' between them." *Halkias*, 31 F.3d at 231 (quoting *DelCostello*,

462 U.S. at 170); *see also Peabody Coal,* 38 F.3d at 852 ("WARN cross-references the NLRA in several respects."); *Newspaper & Mail Deliverers' Union v. United Magazine Co.,* 809 F. Supp. 185, 191 (E.D.N.Y. 1992) ("the relationship between WARN and the NLRA is strengthened" by linguistic similarities). The district court in this case made similar observations. Pet. App. 20a-22a.

In fact, WARN's definitional borrowing from the NLRA occurs in both the actual text of WARN (*see* 29 U.S.C. § 2103(2), providing that NLRA "economic strikers" are not entitled to notice, and 29 U.S.C. § 2101(a)(4), incorporating NLRA definition of "exclusive representative"), and in the Labor Department's implementing regulations. *See, e.g.,* 20 C.F.R. § 639.3(d) (1994) (defining "representative" for WARN purposes by explicit reference to subsections 9(a) and 8(f) of the NLRA); 20 C.F.R. § 639.3(a)(1)(ii) (1994) (defining reasonable expectation of recall"); 20 C.F.R. § 639.3(a)(2) (1994) (defining "independent contractors and subsidiaries" by reference to NLRA case law). Indeed, Congress itself recognized the interrelationship between the NLRA and WARN by including the following provision in the statute:

> The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act. . . .

29 U.S.C. § 2108.

b. ***The close relationship between WARN and the NLRA has been recognized by all three branches of government.***

Given the linguistic overlap between WARN and the NLRA, "it is not surprising that, like the Department of Labor, federal courts [also] have turned to NLRA case law in interpreting WARN." *Halkias,* 31 F.3d at 232. This

borrowing occurs not just in the area of limitations, but also to fill in legislative gaps throughout the statute. Indeed, in *United Steelworkers*, 809 F. Supp. at 9, the earlier action against North Star arising from the same factual circumstances, the court borrowed provisions of the NLRA to determine prejudgment interest and attorney's fees. *See also, e.g., Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1283 (CA5 1994) (borrowing NLRA's "back pay" definition), *cert. denied*, No. 93-1857), 1994 WL 213246 (U.S. Jan. 23, 1995); *Union of Elec., Elec. Salaried Machinists & Furniture Workers Local 397 v. Midwest Fasteners, Inc.*, 779 F. Supp. 788, 796 (D.N.J. 1992) (borrowing NLRA's "single employer" test); *Damron v. Rob Fork Mining Co.*, 739 F. Supp. 341, 344 (E.D. Ky. 1990) (borrowing NLRA's "reasonable expectation of recall" standard for determining similar provision in WARN), *aff'd*, 945 F.2d 121 (CA6 1991); *Washington v. Aircap Indus. Corp.*, 831 F. Supp. 1292, 1296 (D.S.C. 1993) ("If the [WARN] regulations are not definitive, it may be appropriate to borrow definitions and factors employed by the NLRB.").

Congress was aware of this overlap between WARN and the NLRA when it debated passage of WARN and agreed upon its final language. Indeed, during the Senate floor debate on WARN, the ranking minority member of the Senate Labor Committee cautioned that WARN "constitutes a major change in the National Labor Relations Act; so much so that it "bascially [sic] . . . amend[s] the [NLRA]." 134 Cong. Rec. 15923, 15924 (1988) (remarks of Senator Hatch).[7] After WARN's enactment, the National Labor Relations Board's General Counsel " 'predicted substantial interplay between the new law [(WARN)] . . . and the nation's basic labor law administered by the NLRB.' " *Halkias*, 31 F.3d at 231-32 (quoting 226 Daily Lab. Rep. (BNA) A-3 (Nov. 23, 1988)).

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[7] *See also* 134 Cong. Rec. at S8605-86-66, 8610-8620 (June 27, 1988); *id.* at S8451-8458 (June 23, 1988); *id.* at S7358-7362 (June 8, 1988).

c. *The Third Circuit erroneously discounted WARN's interrelationship with the NLRA.*

Despite these numerous connections and analogies between the two federal statutes, the Third Circuit's decision here rests on a supposed "lack of similarity between the NLRA and WARN." Pet. App. 10a n.2. To support this astounding conclusion—remarkable in light of the extensive authority reviewed above—the court described WARN as a "substantive" statute, while maintaining that the NLRA "is concerned with ensuring an equitable bargaining process." Pet. App. 7a, 8a (citation omitted). The court also maintained that the statutes are not analogous because, allegedly unlike the NLRA, "[t]he benefits of WARN accrue not only to unionized workers but to all workers alike." Pet. App. 8a.[8]

The Third Circuit's reasoning is both factually flawed and premised on a distorted understanding of this Court's precedent. First, the Third Circuit's attempt to draw a distinction between the "substantive" nature of WARN and the "procedural" purpose of the NLRA is mistaken. It is beyond question that the NLRA creates significant substantive rights for all employees—including the Section 7 right to engage in concerted activity and the right of unionized employees to notice of layoffs and terminations. Indeed, as *Halkias* correctly observed,

> The purposes of the NLRA are similar to those of WARN. Both regulate labor-management relations:

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[8] In *Specialty Paperboard*, the Second Circuit justified its borrowing of Vermont's six-year residual limitations period on similar grounds. *See Specialty Paperboard*, 999 F.2d at 54-55 ("purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss . . ."; WARN "has only a tangential effect on collective bargaining"). *See also* A. Kent Mayo, Comment, *Warning! This Claim Will Not Self-Destruct In Six Months—Claims Arising Under The 1988 Worker Adjustment And Retraining Act*, 72 Wash. U. L.Q. 545 (Spring 1994) (outlining Second Circuit's reasoning).

> WARN, by requiring notice of impending layoffs and terminations; the NLRA, by facilitating concerted action by employees and governing collective bargaining procedures. Both do so to achieve similar objectives.
>
> * * * *
>
> WARN's purpose may be seen as a subset of the NLRA's . . . .

31 F.3d at 233. *See also* Pet. App. 21a (district court here observed that, "[w]hile the specific rights created by [WARN and the NLRA] are different, the policies behind each of the acts are consistent, mutually-reinforcing, and to some extent identical.").

Moreover, even assuming for the sake of argument that a distinction between the procedural and substantive "purposes" of the statutes could be discerned, the Third Circuit's asserted basis for rejecting federal borrowing still would be inadequate. As the Fifth Circuit observed,

> [a] strict identity of purposes is not a requisite for borrowing a limitations period from one federal statute for use in another. To the contrary, a federal statute's limitations period is to be borrowed, if, among other things, it provides a *closer analogy* than available state statutes. If an identity of purposes were required, it would seem that the Court [in *Agency Holding Corp.*] would not have borrowed the Clayton Act's limitations period in establishing a uniform period for RICO.

*Halkias*, 31 F.3d at 233 (citations and quotations omitted) (emphasis in original). *See also Peabody Coal*, 38 F.3d at 856 ("[D]espite admitted differences between WARN and the NLRA, both are designed to afford protection against job loss—a safeguard that goes to the heart of the employment relationship . . . . [T]his similarity of purpose provides the analogy necessary to extend section 10(b) outside the parameters of the NLRA.") (citation omitted).

Similarly in error is the Third Circuit's statement that the NLRA protects only unionized employees. Like WARN, the NLRA applies to employment disputes even when the affected employees are not represented by a union.[9] For example, the NLRA protects activities undertaken by employees for "mutual aid and protection" without regard to any collective bargaining relationship or the employees' desire for unionization. *See, e.g., National Labor Relations Bd. v. Columbia Univ.*, 541 F.2d 922, 931 (CA2 1976) ("there can be little doubt that the protection afforded to concerted activities under the NLRA applies equally to workers in unionized or in non-unionized firms"); *Hugh H. Wilson Corp. v. National Labor Relations Bd.*, 414 F.2d 1345, 1347 (CA3 1969) ("The mantle of protection of concerted activities . . . extends to both union and non-union employees.") (footnotes omitted), *cert. denied*, 397 U.S. 935 (1970); 1 *The Developing Labor Law* 137 (P. Hardin *et al.* eds., 3d ed. 1992) (NLRA "broadly protects 'concerted' activity, not merely union activity."). In essence, the NLRA applies to any dispute between an employer and its employees acting as a group—much like WARN protects employees from "mass layoffs," but not individual terminations.

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[9] That the NLRA protects all employees, not just union members, is well-supported by case law. The NLRA even provides protections for individual workers against unions. *See, e.g., National Labor Relations Bd. v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit [NLRA § 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."); *Pittsburgh Press Co. v. National Labor Relations Bd.*, 977 F.2d 652, 655 (D.C. Cir. 1992) ("Section 8(b)(1)(A) of the NLRA makes it an unfair labor practice for a union to restrain or coerce an employee in the exercise of his or her rights protected by the Act, including the right to refrain from assisting a labor union."); *Local Union 1397, United Steelworkers v. United Steelworkers*, 748 F.2d 180, 183 (CA3 1984) (noting that NLRA is concerned with protecting individual workers from arbitrary action by unions); *Scooba Mfg. Co. v. National Labor Relations Bd.*, 694 F.2d 82, 84 (CA5 1982) ("The mere fact that an employee acts alone does not preclude treatment of his action as a protected

d. ***The Third Circuit erred by applying Pennsylvania law without finding any analogy between WARN and the suggested state limitations periods.***

Another striking weakness in the Third Circuit's reasoning is the court's failure to review the Pennsylvania statutes that it determined to be more analogous to WARN than the NLRA is. *See DelCostello*, 462 U.S. at 172 (federal law applies if it provides "closer analogy than available state statutes"). Had it attempted such a review, the court would have found precious little analogy between state law and WARN.

WARN constitutes federal labor legislation that has no relationship to state common law or to traditional areas of state regulation. *See Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989) ("notice obligations of WARN and the accompanying remedies are novel creations of Congress"). WARN's central purpose is to provide unions, employees, and affected communities with advance notice of large-scale layoffs, so that affected employees can have time to search for new work and a local government can make retraining and transition assistance available. 20 C.F.R. § 639.1(a) (1994). Even federal job retraining funds are coordinated with labor organizations through the states under the Job Training Partnership Act, 29 U.S.C. § 1656. WARN's purposes, and the statutory notice provisions designed to achieve them, never existed at common law. Rather, they are a unique federal statutory creation without analogy in state statutory provisions or in pre-existing constitutional guarantees.

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activity under the [NLRA]."), *cert. denied*, 466 U.S. 926 (1984); *National Labor Relations Bd. v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (CA6 1981) ("Employees may engage in concerted activities protected by section 7 [of the NLRA] regardless of whether the employees are members of a union."); *Plasticrafts, Inc. v. National Labor Relations Bd.*, 586 F.2d 185, 190 (CA10 1978) ("It seems clear that the rights of individual employees are protected by Section 8(a)(1) of the Act—not merely the rights of the bargaining group as a whole.").

Perhaps as a consequence of this lack of similarity between WARN and any existing state law or cause of action, respondents in this case and in *Crown Cork & Seal* suggested no fewer than four alternative state limitations periods to the Third Circuit: the three-year Pennsylvania Wage Payment and Collection Law, Pa. Stat. Ann. tit. 43, § 260.9a(g) (1992); the four-year limitations period for implied contracts, 42 Pa. Cons. Stat. Ann. § 5525(4) (1980); the six-year state "residual" statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527 (1994); and Pennsylvania's two-year statute for enforcing civil penalties, 42 Pa. Cons. Stat. Ann. § 5524(5) (1994).[10] The dissimilarity between these statutes and WARN is self-evident. Indeed, in *Haggerty v. USAir, Inc.*, 952 F.2d 781 (CA3 1992), the Third Circuit previously rejected the applicability of many of the very same Pennsylvania statutes to an analogous claim for damages under the Airline Deregulation Act's worker dislocation provisions. *Id.* at 786.

Moreover, in considering a parallel group of Texas statutes in the context of WARN, the Fifth Circuit drew the following conclusions equally applicable to the Pennsylvania provisions:

> In sum, canvassing the possible Texas periods reveals none as analogous to WARN as the NLRA. None seeks to accommodate the same, or very similar, interests as WARN, much less govern an action that will frequently overlap with WARN. And, needless to say, none embraces causes of action that share common language with WARN.

*Halkias*, 31 F.3d at 235-36 (footnotes omitted). *See also Peabody Coal*, 38 F.3d at 855 ("The only commonality between WARN and the proffered state statute is that both are pieces of legislation.").[11]

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[10] For obvious timeliness reasons, Respondents did not proffer the six-month limitations period contained in the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 959(h) (1994).

[11] When the district court assessed a comparison between the NLRA and potential Pennsylvania limitations periods advanced

By refusing even to consider the obvious dissimilarities between WARN and the proffered state limitations periods —and by failing to credit the widely-recognized analogies between WARN and the NLRA—the Third Circuit profoundly misapplied the precedent of *DelCostello* and *Lampf*. Any fair comparison of WARN to potential state statutes of limitations leads inexorably to the conclusion that federal law provides a far closer analogy, and that the NLRA should determine the WARN limitations period.

### 3. *The federal policies at stake favor the application of the NLRA's limitations period.*

Finally, as *DelCostello* holds, federal courts should "not hesitat[e] to turn away from state law" when "the federal policies at stake" support the borrowing of a federal limitations period. 462 U.S. at 172. By failing to recognize that quick resolution of labor disputes is an important federal interest fully applicable to WARN, the Third Circuit compounded its misapplication of the *DelCostello* criteria.

#### a. *Congress and the courts repeatedly impose short limitations periods for federal labor matters.*

The speedy resolution of employment disputes is a long-standing cornerstone of federal labor policy. *See Halkias*, 31 F.3d at 238 ("federal labor policy has long favored the rapid settlement of disputes between an employer and an employee"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (discussing strong federal policy in favor of speedy resolution of industrial disputes through arbitration). Even when Congress includes limitations periods in federal statutes affecting the employer/employee relationship, the filing deadlines are

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here, it expressly determined that "the framework and goals of the National Labor Relations Act are such that it is more analogous to the Worker Adjustment and Retraining Notification Act than to any state statute of which we are aware." Pet. App. 22a.

consistently short. *See, e.g.*, National Labor Relations Act § 10(b), 29 U.S.C. § 160(b) (providing six-month limitations period for filing unfair labor practice charge before NLRB); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) (requiring the filing of an employment discrimination charge with the EEOC within 180 days); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(d) (same); Americans With Disabilities Act, 42 U.S.C. § 12117(a) (same); Civil Service Reform Act of 1978, 5 U.S.C. § 7118(b) (requiring federal employees to file unfair labor practice charges within six months).

Given this statutory preference, it hardly is surprising that the courts have "borrowed" short federal limitations periods when Congress fails to include a statute of limitations in employment-related legislation. *See, e.g., DelCostello,* 462 U.S. at 169 (borrowing NLRA's six-month limitations period for "hybrid" Section 301/duty of fair representation claims); *Haggerty,* 952 F.2d at 787 (borrowing NLRA limitations period for worker dislocation provisions of Airline Deregulation Act). *See also Lloyd v. United States Dep't of Labor,* 637 F.2d 1267, 1271 (CA9 1980) (approving one-year limitations period for "retraining, adjustment and relocation" benefits under federal Trade Act of 1974); *Occidental Chem. Corp. v. International Chem. Workers Union,* 853 F.2d 1310, 1316 (CA6 1988) ("Given the desirability of a rapid resolution of disputes over an arbitrator's award, three months appears to us to be a more appropriate limit than six for an action attacking the validity of an award.").

b. ***A short limitations period is equally appropriate for WARN.***

Despite this established statutory and judicial preference for short labor limitations periods, the Third Circuit dismissed its applicability in a single paragraph. Without even acknowledging the existence of several other federal employment provisions that also have short limitations periods, the court, characterizing the burden of filing an

unfair labor practice charge under the NLRA as "minimal," concluded that applying this same six-month limitation period to WARN "could very well frustrate the policies behind WARN." Pet. App. 14a.[12]

However, there is no evidence to indicate that the burden of filing a WARN action within six months is any greater than that of timely filing an unfair labor practice charge. The "plant closings" or "mass layoffs" that can give rise to a cause of action under WARN are by their very nature obvious and not hidden from view. Their impact on affected employees is readily apparent and not difficult to assess. Moreover, one employee can sue for all, and any employee can bring a claim wherever the employer does business. 29 U.S.C. § 2104(a)(5). Additionally, appropriate legal representation is likely to be readily available to prospective litigants, given that WARN, unlike the NLRA, provides attorney's fees for successful claimants. *See* 29 U.S.C. § 2104 (a)(6). Not surprisingly, a large and growing number of claimants—without even the assistance of union representation—have filed WARN claims within six months of the triggering event.[13]

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[12] The Second Circuit applied an identical rationale in *Specialty Paperboard*, 999 F.2d at 55 (short statute of limitations under NLRA justified by "minimal" burden to pursue unfair labor practice charge).

[13] *See, e.g., Jurcev v. Central Community Hosp.*, 7 F.3d 618, 621-22 (CA7 1993) (two weeks), *cert. denied*, 114 S. Ct. 1830 (1994); *Johnson v. Peters Truck Lines*, 8 Indiv. Empl. Rights Cas. (BNA) 1036 (N.D. Cal. 1993) (approximately one month); *Moore v. On-Line Software Int'l, Inc.*, 8 Indiv. Empl. Rights Cas. (BNA) 1089 (N.D. Ill. 1993) (within six months); *Washington v. Aircap Indus. Corp.*, 8 Indiv. Empl. Rights Cas. (BNA) 1426 (D.S.C. 1992) (within six months); *Solberg v. Inline Corp.*, 740 F. Supp. 680 (D. Minn. 1990) (within six months); *Finkler v. Elsinore Shore Assocs.*, 725 F. Supp. 828 (D.N.J. 1989) (within six months); *In re Mr. Goodbuys of New York Corp.*, 164 B.R. 24 (Bankr. E.D.N.Y. 1994) (within five months); *In re Riker Indus., Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993) (within one month); *see also Cruz v.*

In addition to the ease of bringing WARN claims, other specific policy considerations fully support the application of a short limitations period. As the Senate Report indicated, WARN "establishes a comprehensive system for providing *prompt* adjustment and training services to dislocated workers." S. Rep. No. 62, 100th Cong., 1st Sess. 2 (1987) (emphasis added). This emphasis on prompt adjustment is reflected in the Act's remedial provisions, which limit damages for each affected employee to sixty days' wages and benefits. 29 U.S.C. § 2101(a)(6). Such a limited remedy, designed to ease the temporary burden of dislocation, quickly loses its meaning with the passage of time. Indeed, as the Sixth Circuit determined, this restrictive damage provision demonstrates Congress' intent to limit WARN litigation to prompt enforcement actions:

> By implementing a 60-day notice requirement, Congress clearly intended to provide short-term relief not only to affected employees, but to their communities and supporting state agencies as well. This purpose of bridging what would otherwise be a drain on resources would be defeated if not rapidly implemented. A prolonged statute of limitations would do nothing to achieve WARN's aim of starting employees on the road to retraining and reemployment before unemployment becomes a problem.

*Peabody Coal*, 38 F.3d at 856. *Cf. Lloyd v. United States Dep't of Labor*, 637 F.2d 1267, 1271 (CA9 1980) (Congress selected short limitations period "to ensure that benefits under the [NLRA] were used for the purpose envisioned" and "to encourage workers to file promptly.").

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*Local Union No. 8, Int'l Brotherhood of Elec. Workers*, 34 F.3d 1148, 1450 (CA2 1994) (unionized employees, in midst of layoffs, timely sued their union for breach of duty of fair representation and their employer for allegedly violating WARN); *United Steelworkers v. North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992) (within one month), *aff'd in relevant part*, 5 F.3d 39 (CA3 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

The Sixth Circuit's view—that the very nature of WARN remedies contemplates their expeditious delivery and thus a short limitations period—has been widely endorsed. One commentator summarized the underlying congressional intent as follows:

> [B]ecause WARN was intended to aid displaced workers by giving them time to seek other employment or training before being terminated, applying a state statute of limitations of several years or more does not serve the policy underlying WARN. Recovering damages several years after being laid off will not help a terminated employee search for immediate training or employment. Rather, these damages would merely ameliorate the employee's general living conditions, a remedy beyond the scope of WARN.

Mayo, 72 Wash. U. L.Q. at 557 (footnotes omitted). *See also Halkias,* 31 F.2d at 239 ("[A]pplication of expansive limitations periods would disserve WARN's most specific objective: the provision of a cushion of time for employees to explore other job opportunities and, if necessary, seek retraining.").[14]

A final policy consideration favoring the adoption of a short WARN limitations period is the likely state of an employer's business following a plant closing or mass layoff. If a lengthy limitations period for WARN actions is permitted—such as the Second Circuit's use of a six-year Vermont period—courts doubtless will confront stale WARN claims for which the records needed to address fundamental liability and damage issues will be impossible

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[14] In contrast, borrowing a state limitations period, such as those existing for contract claims, likely would undermine the federal policy favoring rapid resolutions of employment disputes. The limitations periods for state contract claims typically start at two years (Ind. Code § 34-1-2, setting forth periods from two to ten years) and go up to fifteen years (Ky. Rev. Stat. Ann. § 413.090 (2)). Such lengthy limitations periods would infuse WARN litigation with unnecessary costs and complexities.

to locate or no longer will be in existence.[15] In addition, with the passage of time, claimants and key witnesses will be increasingly likely to have dispersed, moving on to other jobs and other locations, thus further burdening such belated litigation. *See Halkias,* 31 F.3d at 238. *Cf. Johnson v. Graphic Communications Int'l Union Local 303,* 930 F.2d 1178, 1182 (CA7) (short NLRA limitations period prevents litigation after records have been lost or destroyed, witnesses have relocated, and memories have dimmed), *cert. denied,* 502 U.S. 862 (1991). Despite the Third Circuit's disregard of these pragmatic and policy considerations, Congress could not have intended a limitation policy that generates such impractical results without in any way advancing the purposes that WARN is designed to serve.

## II. THE COURT'S CURRENT LIMITATIONS BORROWING DOCTRINE IS FLAWED AND SHOULD BE RE-EXAMINED.

Although the *DelCostello* framework conclusively establishes the applicability of the NLRA limitations period to WARN, the Court may wish to revisit the wisdom of its current borrowing doctrine. Specifically, it appears that the underpinnings of that doctrine are fatally defective—particularly now that Congress has rejected the most important ground for the doctrine's continued vitality. In its place, the Court could adopt a borrowing doctrine in which federal law is used almost exclusively to determine federal limitations periods.

As noted, the existing practice of applying state statutes of limitations to federal causes of action is premised on only the most tenuous of historical considerations. It was born out of the fiction that the Rules of Decision

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[15] Federal law—in keeping with the short limitations periods for labor and employment claims—only requires employers to retain payroll records indicating the names of employees and their paid remuneration for a period of three years. 29 C.F.R. § 516.5 (1994); 29 C.F.R. § 1627.3(a) (1994).

Act requires federal courts to borrow state law—an axiom no longer accepted by the Court. *DelCostello*, 462 U.S. at 160 n.13. *See also* Joseph L. Calamari, Note, *The Limited Reach of DelCostello v. International Brotherhood of Teamsters: A Statute of Limitations in LMRDA Title I Actions*, 56 Fordham L. Rev. 227, 245 n.19 (1987) ("Both the majority approach and Justice Scalia's view agree that the Rules of Decision Act does not mandate application of state limitations periods because the Act merely begs the question, authorizing federal courts to use state laws 'in cases where they apply.'") (citations omitted).

Although the nineteenth century view of the Rules of Decision Act has fallen into disfavor, the practice of using state law to fill gaps in federal substantive statutes has not. Without intensive consideration of the subject, the Court has premised its continued borrowing of state limitations periods on the belief that Congress "intends by its silence that we borrow state law." *Lampf*, 501 U.S. at 355 (quoting *Agency Holding Corp.*, 483 U.S. at 147).

But, in light of Congress' recent enactment of a "fallback" statute of limitations for all civil claims arising under federal legislation passed after December 1, 1990, it is highly doubtful whether Congress' legislative inaction with respect to limitations periods for pre-existing federal statutes should be interpreted as an endorsement of continued borrowing of state law. To the contrary, the legislative rationale for a new federal "fallback" statute applies with equal force to pre-existing federal statutes, and Congess appears to have recognized as much during its deliberations on the new law, 28 U.S.C. § 1658.[16] This legislation

[16] Because Section 1658 explicitly provides that it does not apply to pre-existing causes of action, the statute does not fix a limitations period for WARN. *Lampf*, 501 U.S. at 364 n.10 ("This new statute obviously has no application in the present litigation."). *See* Kimberly Norwood, *28 U.S.C. § 1658: A Limitation Period With Real Limitations*, 69 Ind. L. J. 477, 503-04 (1994).

was motivated by a congressional conviction that *the continued absorption of state limitations periods for federal statutes is undesirable.* As the Chair of the Senate Judiciary Committee observed:

> Statutes of limitations provide a specific time period after the contested event within which a case must be commenced. *At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, appeals* [sic] *to lack persuasive support as a matter of policy.*
>
> It also creates several practical problems: it obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

*See* 136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Biden) (emphasis added).[17]

Congress has not been alone in recognizing the defects in the current limitations borrowing scheme. Indeed, Senator Biden's remarks in the Congressional Record were excerpted from the findings of the 1990 Report of the Federal Courts Study Committee, appointed by Chief Justice Rehnquist. *See* Federal Courts Study Committee, Judicial Conference of the United States, *Report of the Federal Courts Study Committee* (1990).

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[17] The House Report on Section 1658 contains similar language. *See* H. R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870. As commentators have noted, Section 1658 "addresses only a small portion of the borrowing problem because it is limited to new federal statutes." Katherine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations By Default*, 72 Neb. L. Rev. 454 (1993).

The Study Committee's analysis of *DelCostello* appears to reflect the views of many federal jurists. *See, e.g., Norris v. Wirtz,* 818 F.2d 1329, 1332 (CA7) ("This is one tottering parapet of a ramshackle edifice. Deciding which features of state periods of limitations to adopt for which federal statutes wastes untold hours.") (citation omitted), *cert. denied,* 484 U.S. 943 (1987). In *Short v. Belleville Shoe Manufacturing Co.,* 908 F.2d 1385 (CA7 1990), *cert. denied,* 501 U.S. 1250 (1991), the court (per Judge Easterbrook) offered the following summary of the many problems attributable to state borrowing:

> From the perspective of practitioners litigating cases originating in many states (especially class actions), the situation is a nightmare. Lawyers and courts alike devote untold hours to identifying proper state analogies and applying multiple (conflicting or cumulative) tolling doctrines. "This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of different parties litigating identical claims in different states. Neither plaintiffs nor defendants can determine their rights with any certainty. Vast amounts of judicial time and attorneys' fees are wasted."

*Id.* at 1389 (quoting ABA Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions,* 41 Bus. Law. 645, 647 (1986).

This Court itself has recognized the social costs incurred by needless litigation over which state statutes of limitations might properly "characterize" a federal claim. In *Wilson v. Garcia,* 471 U.S. 261 (1985), the Court drew the following conclusion:

> [T]he legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.

> On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.

*Id.* at 275 & n.34.

Recent commentaries have echoed these legislative and judicial doubts about the wisdom of continued state limitations borrowing and have drawn attention to the obvious adverse impact that this current policy has on the equitable administration of federal rights. One commentator summarized these concerns as follows:

> [B]orrowing state time-bars for federal claims causes serious equitable concerns. The state legislatures do not consider the federal interests at issue when they adopt a statute of limitations for a particular state right or category of state rights. Accordingly, the litigants' interests in the federal right, as well as society's interest in having that right asserted, are not part of the state's balancing process.
>
> * * * *
>
> More importantly, borrowing state time-bars leads to the inequitable administration of federal rights. One of the main reasons for enacting a federal law, rather than leaving the problem to the states, is the need for uniformity. When the courts borrow state limitations periods for federal claims, federal rights vary from state to state because each state has its own statutes of limitations.

Nelson, 72 Neb. L. Rev. at 454 (footnotes omitted). *See also* Norwood, 69 Ind. L.J. at 512-13 ("[W]henever a state enjoys the right to decide the longevity of a federal statutory claim, federal interests are automatically frustrated. . . . [A] national cause of action should [not] affect litigants differently depending upon the state in

which the plaintiff is able to meet jurisdictional and venue requirements.") (footnotes omitted).

The Study Committee, the courts, and the commentators are correct in recognizing the fundamental deficiencies in the Court's existing limitations borrowing practice. Now that Congress has concurred in this assessment—thereby eliminating the principal justification for perpetuation of the current scheme—the time has come for a more efficient and rational borrowing doctrine. That doctrine should rely almost exclusively on federal law to determine federal statutes of limitations, thereby ensuring the equitable and uniform application of federal rights throughout the nation. Such uniformity will end practitioners' senseless "characterization" odyssey through state law, the corresponding lure of forum shopping, and the resulting waste of judicial and litigants' resources.[18]

Under an almost exclusive federal borrowing doctrine, the NLRA is clearly the most appropriate statute from which to borrow for the WARN limitations period. For the reasons stated above, the NLRA and WARN are closely analogous, and the two statutes share a similarity in purpose and structure unmatched in the federal statutes. Accordingly, the six-month NLRA limitations period should be applied to WARN.

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[18] Admittedly, a better solution to borrowing from other federal laws would be to have Congress enact a limitations period for every federal statute that is presently without one. For a thoughtful discussion of the subject, *see Short*, 908 F.2d at 1393-95 (Posner, J., concurring). Unless and until Congress takes such action, however—and it is not the sort of measure likely to be viewed as one of great urgency—borrowing from other federal laws is far superior to the present state of affairs.

## CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded with instructions to reinstate the district court's judgment in favor of the Petitioner.

Respectfully submitted,

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In the

# Supreme Court of the United States

October Term, 1994

NORTH STAR STEEL COMPANY,

*Petitioner*,

v.

CHARLES A. THOMAS, *et al.*,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## QUESTION PRESENTED

In actions brought under the Worker Adjustment and Retraining Notification Act, should courts borrow the limitations period from the National Labor Relations Act, as opposed to state law or another federal statute, such as the Fair Labor Standards Act?

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In the

# Supreme Court of the United States

October Term 1994

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No. 94-834

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NORTH STAR STEEL COMPANY,

*Petitioner,*

v.

CHARLES A. THOMAS, *et al.*,

*Respondents.*

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**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Third Circuit**

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## BRIEF FOR RESPONDENTS

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## STATEMENT

### A. Facts

Until 1991, petitioner North Star Steel Corporation ("North Star") operated a production facility in Milton, Pennsylvania, producing hot rolled steel bars and other steel products. The production employees, who were paid by the hour, were represented in collective bargaining by the United Steelworkers of America ("USWA"). The respondents in this case, by contrast, were salaried employees who were not represented by any union. Joint Appendix ("JA") 15.

On February 25, 1991, petitioner announced that all of its employees would be laid off, effective immediately, for an indefinite period. JA 15-16. None of the employees, hourly or salaried, was given any advance notice of this action. Appendix to the Petition ("Pet. App.") 17a. Petitioner refused to state how long the plant would be closed, or even whether the closure was permanent. JA 16. As a consequence, it did not give respondents the accumulated vacation and severance pay to which they would have been entitled if their lay-offs were permanent. JA 16, 18-19. Respondent Thomas, who was the purchasing manager at the Milton plant, made numerous inquiries about petitioner's plans, but received only vague and inconclusive answers. *Id.*

The USWA did not accept petitioner's claim that it was unsure how long the layoff would last, and so, on September 9, 1991, it sued in the United States District Court for the Western District of Pennsylvania, claiming that petitioner's failure to provide advance notice violated the Worker Adjustment and Retraining Notification Act ("WARN"). *USWA v. North Star Steel*, 809 F. Supp. 5, 6 (M.D. Pa. 1992), *aff'd*, 5 F.3d 39 (3d Cir. 1993). Because USWA only sued on behalf of its own members, it sought no relief for respondents. *Id.* at 7. Although that suit was filed more than six months after the unannounced closing of the plant, petitioner did not raise the statute of limitations as a defense.

Eventually, respondent Thomas began to put his inquiries in writing. JA 16-17. Meanwhile, petitioner conceded in the USWA suit that it had committed what it called a "technical" violation of WARN, and on April 9, 1992, the district court granted summary judgment against petitioner, and later determined the number of days for which it was required to pay the USWA's members. *USWA v. North Star Steel Co.*, *supra*. By letter dated May 21, 1992, petitioner promised respondent Thomas that it would make the same payments to its non-union employees as the district court decided had to be made to employees represented by the USWA. JA 19. Although petitioner continued to make

such promises, JA 20, it ultimately provided the respondents only with their accumulated vacation and severance pay. JA 13, 17. As late as August, 1992, petitioner was claiming that it had originally anticipated that the lay-off would be only temporary, and that only in that month had it decided to make the closure permanent. JA 13.

### B. Proceedings Below.

Two months later, on October 23, 1992, respondents filed this action against petitioner in the Middle District of Pennsylvania, alleging that petitioner's failure to notify them violated WARN. Petitioner's answer did not deny that it had violated WARN, but did raise the statute of limitations as an affirmative defense, arguing that the six-month period of section 10(b) of the National Labor Relations Act ("NLRA") should be borrowed.[1]

On April 1, 1993, respondents moved for summary judgment on the merits, and petitioner cross-moved for summary judgment based on its statute of limitations defense. On May 25, 1993, the district court granted petitioner's motion for summary judgment. 838 F. Supp. 970. Respondents appealed to the Third Circuit, which consolidated their appeal with *USWA v. Crown, Cork & Seal Corp.*, a case presenting the same issue. Respondents argued that the court should follow the normal rule of borrowing a limitations period from state law, that the NLRA was not closely analogous to WARN, and that federal policies and the practicalities of litigation did not require a federal limitations period for WARN any more than they do for most federal

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[1] Respondents argued that petitioner's misleading statements in response to Thomas' inquiries about its plans should estop petitioner from raising a limitations defense. The district court rejected this argument, Pet. App. 24a, which was not pressed on appeal.

statutes. To the contrary, respondents pointed out, the arguments advanced by petitioner for borrowing from federal law would apply equally to most federal statutes, and so adopting petitioner's analysis would make borrowing from federal law the normal rule, rather than the exception.

In arguing against the adoption of section 10(b), respondents pointed to several more analogous limitations periods, both state and federal, under which their claims would have been timely. They argued, however, that it was unnecessary for the court to pick one of these alternatives, because the choice would not affect the outcome of the appeal, and thus would be mere dictum.

The court of appeals reversed. 32 F.3d 53 (3d Cir. 1994). It began by noting this Court's repeated holdings that, if a federal statute contains no statute of limitations, the normal rule is that courts should borrow the most closely analogous state law limitations period. *E.g.*, *Reed v. UTU*, 488 U.S. 319 (1989); *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Although there is an exception for cases where a federal limitations period "**clearly** provides a closer analogy" **and** the federal policies at stake make that rule "**significantly** more appropriate," *DelCostello*, 462 U.S. at 172 (emphasis added), this exception is "closely circumscribed." *Reed*, 488 U.S. at 324, *quoted* Pet. App. 6a. The court also noted this Court's expression of distress in *Reed* that many lower federal courts had failed "to take seriously our admonition" that borrowing from state law is the norm, and that using a federal statute is the rare exception, "in labor law as elsewhere." *Id.*

Based on that standard, the court found no sound argument for borrowing from federal law. Although WARN cases and NLRA claims have some features in common, the purposes, procedures, rights and remedies of the two statutes are quite different. *Id.* 7a-11a. Nor were there serious reasons to believe that the interest in uniform characterization of federal statutes that encompass a broad variety of claims

and legal theories provided a basis for borrowing from federal law, as in the case of RICO claims. *Agency Holding Corp. v. Malley-Duff & Assoc's*, 483 U.S. 143 (1987). *See also Wilson v. Garcia*, 471 U.S. 261 (1985) (borrowing the same state period to govern all section 1983 claims). Pet. App. 12a-13a. Finally, the court noted that an unduly short limitations period might well frustrate the ability of affected workers to bring claims. *Id.* 14a-15a.

For all these reasons, the court of appeals held that a state limitations period, rather than section 10(b), should be borrowed, and accordingly it reversed the dismissal of respondents' claims. In rejecting petitioner's contention that section 10(b) ought to be borrowed to govern WARN, the court of appeals declined to decide which limitations period should be borrowed, because the actions would be timely under any of the possibilities that had been brought to its attention, and because petitioner had not identified any other limitations period under which the action would be untimely. *Id.* 15a.

## SUMMARY OF ARGUMENT

As a general rule, the limitations period for a federal cause of action is borrowed from the most closely analogous state law. In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), this Court applied what it characterized as a "narrow exception" to this general rule for the federal "hybrid" action to enforce rights under collective bargaining agreements ("CBAs") when a union violates its duty of fair representation ("DFR"), which is implied by the NLRA. The Court decided that, because the prompt resolution of disputes involving CBAs helps maintain labor peace, a short limitations period was required to allow the bargaining parties to be certain that their resolutions of such disputes were, in fact, final. Accordingly, it ruled that the six months allowed by section 10(b) of the NLRA for filing unfair labor practice ("ULP") charges would be borrowed for DFR suits. The

Court emphasized, however, both in *DelCostello* and in later cases, such as *Reed v. UTU*, 488 U.S. 319 (1989), that the borrowing of state limitations period was to remain the norm, for labor law as well as other federal claims.

This general rule, and not the narrow exception, applies to WARN claims. To be sure, most labor law claims could be said to have some connection to bargaining disputes. But if the result in *DelCostello* is to remain an exception rather than become the rule, the application of section 10(b) must be confined to claims which carry the same direct and immediate threat to the finality of bargaining compromises that DFR claims do.

WARN claims are not analogous to the NLRA; they are even less analogous to the NLRA than, say, claims under 42 U.S.C. §§ 1981 and 1983 are to claims under the Civil Rights Act of 1964. *See Wilson v. Garcia*, 471 U.S. 261 (1985). And WARN claims are just as analogous to state law claims in contract, to Pennsylvania's Wage Collection Statute, or to its residual limitations period as are claims under 42 U.S.C. §§ 1981 and 1983 to general personal injury claims. Thus, WARN does not qualify for federal borrowing under the first prong of the *DelCostello* test.

Nor do WARN claims threaten the finality of grievance decisions, as do DFR claims, which are based on workers' economic rights as members of a bargaining unit represented by a union. WARN claims, by contrast, are founded on employees' statutory rights, independent of any contract, even a CBA. Indeed, only 10% of all employees protected by WARN are even represented by unions; most such employees are unrepresented, as are respondents here. Moreover, the adoption of a short statute of limitations threatens the remedial objectives of WARN, and, given the tenuous connection between WARN claims and bargaining compromises, there is no countervailing justification for endangering the ability of workers to protect their rights, unlike the need for finality in DFR actions.

Instead of trying to argue that WARN requires the borrowing of a federal limitations period under the standard set in *DelCostello*, *Reed* and elsewhere, petitioners ask for the adoption of a different standard. Petitioner North Star does this openly in the last section of its brief, but both petitioners do so throughout their briefs by recasting the *DelCostello* test as one that gives federal limitations periods at least an equal status with state periods. Indeed, petitioners place so much emphasis on the need for a limitations period whose duration is the same in every state, that their test covertly creates a strong presumption in favor of federal borrowing. But the arguments that petitioners advance for reversing 165 years of precedent favoring state law borrowing are unconvincing, and adoption of their proposed test would effectively reopen the question of the proper limitations period for every federal statute. The litigation over this question would produce the very unpredictability and increased litigation costs that petitioners advance as the reason for adopting their proposed rule.

Under the general rule of borrowing from state law, either the three-year limitations period for enforcing claims under Pennsylvania's Wage Payment Collection Law, or the four-year period for suing under either an express contract, not in writing, or a contract implied in law, is the most analogous state period. Even if the Court chooses to borrow a federal limitations period, the two and three year limitations period for filing wage claims under the Fair Labor Standards Act provides a better balance between employers' interest in repose and workers' interest in protecting rights that Congress has granted them. Indeed, if the Court is persuaded by petitioner North Star's appeal to the supposed Congressional intent behind the new four-year residual limitations period as a reason to abandon the traditional preference for state law borrowing, it should borrow that new limitations period to govern WARN.

## ARGUMENT

### I. UNDER *DELCOSTELLO* AND ITS PROGENY, THE GENERAL RULE, "IN LABOR LAW AND ELSEWHERE," REQUIRES THE BORROWING OF STATE LIMITATIONS PERIODS, SUBJECT TO A "NARROW EXCEPTION" WHEN A "COMPELLING" CASE CAN BE MADE TO BORROW A FEDERAL PERIOD INSTEAD.

With some exceptions, federal statutes do not contain their own limitations periods; rather, they must be borrowed from other sources. At least since *M'Cluny v. Silliman*, 3 Peters 270, 277 (1830), this Court has repeatedly declared that, as a general rule, courts should apply the most closely analogous state statute of limitations.[2] Some of the early decisions indicated that this rule was compelled by the Rules of Decision Act, 28 U.S.C. § 1652. *See id.* at 277; *see also Campbell v. City of Haverhill*, 155 U.S. 610, 615 (1895) (Rules of Decision Act gives courts discretion to refuse to apply state limitations periods that allow insufficient time to sue). However, at least since *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946), the Court has treated "the implied absorption of State statutes of limitation within the interstices of federal enactments [as] a phase of fashioning remedial details where Congress has not spoken but left matters for

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[2] *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975); *Runyon v. McCrary*, 427 U.S. 160, 180 (1976), *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-705 (1966); *Cope v. Anderson*, 331 U.S. 461, 463-464 (1947); *Rawlings v. Ray*, 312 U.S. 96, 97-98 (1941); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914); *Campbell v. City of Haverhill*, 155 U.S. 610, 619-620 (1895).

judicial determination within the general framework of familiar legal principles."[3]

The selection of which state statute of limitations to borrow sometimes presents a difficult issue of characterization, because federal statutes frequently create rights for which there is no exact state parallel. The Court has made clear, however, that mere difficulty of characterizing the federal law is not a sufficient reason to abandon the effort. *DelCostello v. Teamsters*, 462 U.S. 151, 171 (1983); *Wilson v. Garcia*, 471 U.S. 261, 272 (1985).

There is a narrow exception to the general rule where the use of analogous state statutes would frustrate the implementation of national policies. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). As the Court held in *DelCostello*, the "hybrid" action against a union and an employer is one example. In order to place in context the reasons why the Court found it necessary to make an exception in such cases, it is important to explain the precise role which "hybrid" actions play in federal labor law, and then how they differ from WARN cases.

Individual employees, as well as their unions, may sue under section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, to enforce rights conferred on them by CBAs between their employers and their unions. *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). But the Court has erected a significant procedural barrier to prevent the courts from being inundated with suits to enforce CBAs — the plaintiff must exhaust contractual grievance procedures, including arbitration, before suit is filed. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). It has also erected a major substantive barrier to such suits — the courts

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[3] Petitioner North Star thus errs in asserting that this analytic development is "recent", Br. at 10, *citing DelCostello*, and implying that, because the change is so recent, it warrants further changes in the governing standard. *Id.* 32-33.

will not overturn arbitral awards unless the award cannot be justified as having drawn its essence from the CBA. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Court has also recognized, however, that employees may be prevented from exhausting the contractual procedures, or may be unable to obtain a fair hearing in arbitration, if the union breaches its DFR either in deciding not to pursue the contractual procedures or in the way it conducts them. Accordingly, the Court has ruled that individual employees seeking to enforce their rights under a CBA will be excused from the exhaustion requirement, and from the highly deferential standard of review under *Enterprise Wheel*, if, but only if, they can show that the union breached its DFR in handling the grievance. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). A lawsuit in which employees seek to enforce both the CBA against the employer, and the DFR against the union, is known as a "hybrid" DFR action.

The issue of the proper limitation period for hybrid actions first reached the Court in *UPS v. Mitchell*, 451 U.S. 56 (1981). In *Mitchell*, the narrow question on which certiorari was granted was which state statute was the most analogous for post-arbitration hybrid suits against employers alone. *Id.* at 61-62. In choosing to borrow the limitations period for suits to vacate arbitration awards, the Court relied on the fact that, absent a fairly short limitations period, the parties to the CBA could not be sure that an arbitrator's resolution of a dispute under the agreement was final. Therefore, the Court rejected state limitations periods for enforcing contractual rights because they allowed too long a period in which the arbitrator's disposition of a grievance was in question, and their use would frustrate federal policy favoring prompt resolution of collective bargaining disputes. *Id.* at 63-64.

Two years later, in *DelCostello*, the issue was whether to apply a federal limitations period, instead of any of the state alternatives, in hybrid suits against both an employer and a union. The Court reiterated its concern that several of the analogous state limitations periods, such as actions for tortious injury or for professional malpractice, were so lengthy that employer-union disputes, and the compromises by which they were resolved (including negotiated terms, settled grievances, or even arbitral adjudications), could remain in limbo for years, and thus could endanger stability in labor relations and, in the long run, labor peace. 462 U.S. at 168-169. The other most analogous state statutes, such as those governing actions to vacate arbitration awards, were so short — generally three months — that aggrieved employees would not have enough time to file suit. *Id.* at 165-168 (undue brevity was "most serious objection" to state-law borrowing). Moreover, the Court recognized that the most analogous state statutes were different for the employer and for the union, and if each were applied to their respective defendant, the result would be the application of different limitations periods to two parties to the same suit, which would clearly have been undesirable. *Id.* at 169 n.19.

Still, the Court said, "[t]hese objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is." *Id.* at 169. However, it found that section 10(b) of the NLRA was significantly more appropriate than any of the state analogies, both because Congress had designed it to accommodate a "very similar balance of interests", *i.e.*, employee rights versus the stability of private adjustment of labor disputes, and because the DFR cause of action was itself implied from the NLRA. *Id.* at 169-171.

The Court carefully emphasized the narrowness of its holding, however, and admonished that courts should not decline to adopt state limitation periods simply because state law fails to provide a perfect analogy:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, **in labor law or elsewhere**. . . . [R]esort to state law remains the norm for borrowing of limitations periods [unless] a rule from elsewhere in federal law **clearly** provides a closer analogy than available state statutes, and . . . the federal policies at stake and the practicalities of litigation make the rule a **significantly more appropriate** vehicle . . ..

*Id.* at 171-172 (emphasis added).

As a result of these limits, the only other labor law suits to which lower courts consistently agree to extend section 10(b) are DFR suits against unions and employers who are covered by the Railway Labor Act ("RLA") rather than the NLRA. According to these courts, such cases are so similar to NLRA hybrid actions that *DelCostello*'s reasoning requires the borrowing of a federal limitations period in such cases as well. *E.g.*, *Sisco v. Conrail*, 732 F.2d 1188 (3d Cir. 1984).[4]

The predominant trend for non-DFR labor cases, however, is illustrated by *Reed v. UTU*, 488 U.S. 319 (1989), where the Court borrowed state limitations periods to govern claims under the Union Members' Bill of Rights,

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[4] This Court has not yet decided whether it is appropriate to borrow a federal limitations period for hybrid suits under the RLA, and, if so, whether the proper federal period for borrowing is the NLRA's six-month limitations period or the RLA's own two-year limitations period, 45 U.S.C. § 153, First (r). Contrary to the implication in petitioner North Star's brief, at 11, this Court did not decide that question in *West v. Conrail*, 481 U.S. 35 (1987). Both parties assumed the applicability of section 10(b), as did the Question Presented, and this Court found it unnecessary to address that issue. *Id.* at 38 n.2.

Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). The Court refused to borrow the six-month period of section 10(b), even though intra-union disputes will sometimes affect collective bargaining disputes, because the latter sort of disputes were often not involved at all, and even when they were involved, LMRDA cases would have

> substantially less immediate and less significant an impact on bargaining and private dispute settlement than that which led us to apply the § 10(b) statute to hybrid § 301/fair representation claims, which directly challenge both the employer's adherence to the collective bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures.

*Id.* at 331.

Moreover, the Court noted, the LMRDA was enacted because Congress was dissatisfied with the NLRA's protection of the union member interests that the LMRDA was intended to safeguard. And, most important, the lower court in *Reed* had "fail[ed] to take seriously our admonition that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies," *id.* at 327, for which a "compelling demonstration" is required. *Id.* *See also Lampf, Pleva, Lipkind v. Gilbertson*, 501 U.S. 350, 356 (1991) (stressing that "state-borrowing doctrine may not be lightly abandoned [and] federal borrowing [i]s 'a closely circumscribed exception'"). As the Court further emphasized,

> This is a narrow exception to the general rule. As we made clear in *DelCostello*, "in labor law or elsewhere," application of a federal statute will be unusual, and "resort to state law remains the norm for borrowing of limitations periods."

> *Reed*, 488 U.S. at 324, *quoting DelCostello*, 462 U.S. at 171.

Remarkably, even though *Reed* is this Court's only decision since *DelCostello* to address the propriety of borrowing section 10(b) to govern a federal labor claim, and although it is the only decision of this Court containing an extended discussion of the meaning of *DelCostello*, neither petitioner discusses *Reed*, nor even cites it for more than a general proposition or for its narrow holding.

Moreover, the limitations periods in employment discrimination cases have been borrowed from state law, *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975), despite the fact that such suits frequently call into question matters which had been resolved between unions and employers. *Id.*; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII case). The lower courts continue to apply state limitations periods in suits under 42 U.S.C. § 1981, even against unionized employers, relying on the general rule discussed in *DelCostello*. *E.g.*, *Howard v. Roadway Express*, 726 F.2d 1529, 1531 (11th Cir. 1984); *see also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661-662 (1987) (suit against union alleging discriminatory grievance handling).

North Star asserts in its brief that section 10(b) "has been applied to claims under other federal labor laws," North Star Br. 11, apparently seeking to convey the sense that courts have generally abandoned the rule of borrowing from state law in labor law cases. This proposition is supported by a highly selective citation of precedent, because the vast majority of appellate cases in the labor law area, particularly since *Reed*, have continued to borrow limitations periods from state law outside the DFR area.

For example, in suits to enforce the NLRA's secondary boycott provisions under section 303 of the LMRA, 29 U.S.C. § 187, no court of appeals applies the six-month period of section 10(b). Instead, all apply longer state

limitations periods, even though labor-management relations are directly affected by such suits, and a secondary boycott, like a breach of the DFR, is a ULP that is governed by the express six-month limitations period for filing charges with the National Labor Relations Board ("NLRB"). Even though the case for borrowing section 10(b) is far more compelling for cases under section 303 than for WARN cases, these courts conclude that the effect of such litigation on stable labor-management relations, and consequently on labor peace, is insufficient to warrant a departure from the normal rule of borrowing analogous state limitations periods.[5]

Similarly, courts of appeals generally hold that claims under ERISA are governed by state limitations periods, not by section 10(b).[6] They apply this rule even when the claim implicates collective-bargaining disputes.[7] And suits to enforce union constitutions under section 301 of the LMRA are usually governed by state limitations periods, although courts sometimes borrow section 10(b) if the claim is parallel to a

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[5] *Monarch Long Beach Corp. v. Teamsters Local 812*, 762 F.2d 228, 231 (2d Cir. 1985); *Carruthers Ready-Mix v. Cement Masons Local 520*, 779 F.2d 320, 325-328 (6th Cir. 1985); *Prater v. UMW*, 793 F.2d 1201, 1209-1210 (11th Cir. 1986).

[6] *E.g.*, *Felton v. Unisource Corp.*, 940 F.2d 503, 510-513 (9th Cir. 1991); *Held v. Manufacturers Hanover Leas. Corp.*, 912 F.2d 1197, 1200-1202 (10th Cir. 1990).

[7] *E.g.*, *Adams v. Gould, Inc.*, 739 F.2d 858 (3d Cir. 1984) (enforcing collectively bargained pension rights); *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 167 (2d Cir. 1984) (enforcing plan against employer that sought to withdraw from multi-employer unit); *Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52 (3d Cir. 1985) (seeking pension benefits for strikers); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987) (claim that plant closing was intended to prevent union members from exercising pension rights).

DFR claim.[8] Even LMRDA cases challenging the ratification of CBAs, the one type of claim on which this Court reserved judgment in *Reed*, 488 U.S. at 331-332 n.6, are now held to be governed by state limitations periods.[9] Indeed, even the two non-DFR examples chosen by petitioner North Star to support its assertion that section 10(b) "has been borrowed" do not represent the majority view of the lower courts with respect to the statutes involved in those cases.[10]

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[8] *E.g.*, *Brenner v. Carpenters Local 514*, 927 F.2d 1283, 1292-1295 (3d Cir. 1991); *Pruitt v. Carpenters Local 225*, 893 F.2d 1216, 1219-1221 (11th Cir. 1990).

[9] Since *Reed*, the courts of appeals have unanimously applied state limitations periods in that situation, even those that had held to the contrary before *Reed*. *Marshall v. Brewers Local 6*, 960 F.2d 1360, 1366-1367 (8th Cir. 1992); *Allgood v. Elyria United Methodist Home*, 904 F.2d 373, 377-378, *reh. granted and app. dism. in part on other grounds*, 913 F.2d 1159 (6th Cir. 1990) (overruling circuit precedent); *Clift v. UAW*, 881 F.2d 408, 412 (7th Cir. 1989) (overruling circuit precedent).

[10] Thus, unlike *Haggerty v. USAir*, 952 F.2d 781 (3d Cir. 1992), most courts borrow state limitations periods to govern the Employee Protection Program of the Airline Deregulation Act. *Bowdry v. United Air Lines*, 956 F.2d 999, 1005 (10th Cir. 1992); *Gonzalez v. Aloha Airlines*, 940 F.2d 1312, 1315 (9th Cir. 1991); *McDonald v. Piedmont Airlines*, 930 F.2d 220, 224-225 (2d Cir. 1991). And although *Aluminum Workers Local 674 v. A.P. Green Refractories*, 895 F.2d 1053 (5th Cir. 1990), applied section 10(b) to a "pure" action under section 301 of the LMRA between a union and an employer, this Court, in a pre-*DelCostello* decision, borrowed state law to govern such an action in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), as many lower courts have done, especially in their post-*Reed* decisions. *E.g.*, *ILA Local 953 v. Cataneo, Inc.*, 990 F.2d 794, 800 (4th Cir. 1993); *SEIU Local*

(continued...)

Thus, the lower courts continue to follow this Court's mandate, in labor law and elsewhere, by borrowing state limitations periods to govern most claims, and federal borrowing remains the rare exception.

## II. NORTH STAR HAS NOT MADE THE "COMPELLING DEMONSTRATION" NEEDED TO SUPPORT BORROWING A LIMITATIONS PERIOD FROM FEDERAL RATHER THAN STATE LAW.

Petitioners contend that WARN warrants an exception to the general rule because, they say, the NLRA is more analogous to WARN than any state statute, and the failure to adopt a uniform federal limitations period may harm WARN's policy objectives. Two courts of appeals, joined by all district courts in circuits where the issue remains open, have borrowed state law.[11] The Sixth Circuit adopted

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[10](...continued)
*36 v. City Cleaning Co.*, 982 F.2d 89, 95 (3d Cir. 1992); *Paperworkers Local 395 v. ITT Rayonier*, 931 F.2d 832, 838 (11th Cir. 1991); *Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222, 224-229 (7th Cir. 1986). Courts are more likely to apply section 10(b) where the section 301 action is brought to compel arbitration. *E.g.*, *Teamsters Local 315 v. Great Western Chem. Co.*, 781 F.2d 764, 769 (9th Cir. 1986).

[11] *Thomas v. North Star Steel Co.*, 32 F.3d 53 (3d Cir. 1994); *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51 (2d Cir. 1993); *Frymire v. Ampex Corp.*, 821 F. Supp. 651 (D. Colo. 1993); *Machinists Local 701 v. Santa Fe Terminal Serv.*, 8 IER Cases 897, 1993 U.S. Dist. LEXIS 5859 (N.D. Ill. 1993); *Teamsters Local 63 v. Santa Fe Terminal Serv.*, 8 IER Cases 778, 1993 U.S. Dist. LEXIS 8923 (C.D. Calif. 1993).

section 10(b), as did a divided panel of the Fifth Circuit, which then, *sua sponte*, granted rehearing en banc.[12]

As we now show, the reasons given by petitioners do not warrant a departure from the general rule of borrowing from state law. Indeed, petitioners are able to argue for the result they favor only by so distorting the test as to create a preference for borrowing from federal law that would govern virtually every federal statute.

### A. Petitioners' Arguments Would Eviscerate the Presumption in Favor of Borrowing Limitations Periods from State Law.

Petitioners can mount a superficially cohesive assault on the decision below only by failing to take seriously this Court's admonitions in *DelCostello* and *Reed* that state law borrowing remains the norm, and that federal borrowing is the "closely circumscribed" exception, 488 U.S. at 324, that must be justified by a "compelling demonstration" that federal policies so require. *Id.* at 627.

For example, on the first prong of the exception, petitioners characterize state law borrowing as only a "fall-back" position, and repeatedly assert that section 10(b) provides a "closer" analogy than various state limitation periods, or is "closest" or "most analogous." North Star Br. 25, 26, *see also* caption 18; Crown, Cork Br. 5, 7, 11, 25, *see also* captions 8, 11; Chamber Br. 8, 9, 12, *see also* caption 6. Petitioners never try to show, as they must, that the NLRA provides a claim that is "clearly" closer to the WARN cause of action than any state law category of claims. At most, they simply place all of the possible analogies in a pot and try to show that none of the state analogies is perfect

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[12] *UMW v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994); *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *reh. granted*, 31 F.3d 248 (5th Cir. 1994).

and that the NLRA is closer than any alternative. Crown, Cork Br. 21-25. But if this were the test, there would no longer be any presumption in favor of borrowing from state law, let alone the strong one established by this Court.[13]

Similarly, in applying the second prong of the test, petitioners' arguments would, if accepted, obliterate the general rule and require that limitations period always be borrowed from federal law. For example, they argue that, unless a single limitations period is used, employers that operate in several different states could be inconvenienced in making nationwide decisions that could lead to layoffs in several different states. North Star Br. 15-18; Crown, Cork Br. at 30-32; Chamber Br. 12-15. As North Star concedes, Br. 13 n.4, this aspect of uniformity would require federal borrowing in all but the most "limited circumstances" because federal laws almost always apply to national entities that operate in different states. The states regularly differ in the amount of time they allow for bringing the same type of claim, and yet state statutes of limitations are routinely borrowed for federal claims against defendants that operate in more than one jurisdiction.

Only federal limitations periods can ensure that claims under a particular federal statute always expire in the same amount of time regardless of the jurisdiction in which the violation was committed or in which the parties live. But such a strong presumption in the direction of borrowing from federal law would stand on its head the repeated statements by this Court, in labor law as in other areas of the law, that borrowing from state law is the norm, and borrowing from federal law the rare exception. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971) (federal limitations period justified "only when the need for uniformity is particularly

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[13] Petitioner North Star's brief does not even bother to analyze state law alternatives; it simply states that their lack of appropriateness is "self-evident." Br. 26.

great"). Petitioners' "uniformity" argument does not serve to distinguish the WARN cause of action from most federal causes of action, or to show why this case warrants the application of the exception rather than the general rule. It is, at best, an argument for changing the presumption, which should be presented to Congress. *See also* pages 43 to 46, *infra* (replying to argument that Court should overrule presumption).

In addition, the statutes at issue in *Reed* and *Hoosier Cardinal* — the LMRDA and section 301 of the LMRA — applied to many defendants that operated in more than one state, but that did not prevent the Court from following the normal federal rule by borrowing from state law. In this day and age, large companies that operate in multiple locations have learned to adapt to the different substantive and procedural requirements of the jurisdictions in which they do business.

To the extent that some companies regulated by WARN may have to take different limitations periods into account in assessing their contingent liabilities and deciding how long to keep their records, it is hard to imagine that the application of the normal rule of borrowing state limitations periods will have any significant impact on those companies' operations, especially because plant closings are not a daily occurrence in any business.

To support their argument that "uniformity" is a central consideration in borrowing decisions, petitioners rely largely on the majority opinion in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987). But the "uniformity" with which the Court was concerned there was not uniformity in length of time, but uniformity in characterization of the cause of action. Thus, in *Malley-Duff*, the Court was impelled to use a federal limitations period for RICO because RICO "encompass[es] numerous and diverse topics and subtopics," which, depending on the precise claim, might be analogous to at least nine different state causes of action. *Id.*

at 149. In that situation, so much time and energy might be spent litigating limitations questions, with the Court unable to answer such questions for all RICO cases with a single ruling, that the practicalities of litigation required the adoption of a single federal period to govern all possible actions under that statute. *Id.* at 150. *Accord*, *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (choosing a uniform characterization under state law, but not a uniform amount of time, for section 1983 claims). That argument does not apply to WARN because it contains only one type of claim — for damages for failure to provide sufficient notification.

Petitioners also cite *Lampf, Pleva, Lipkind v. Gilbertson*, 501 U.S. 350 (1991), to support their argument giving primacy to borrowing statutes that make the amount of time in which to sue the same in every state. But the part of the *Lampf* opinion containing such language, 501 U.S. at 357, drew the support of only a minority of the Court.[14] *Lampf*'s holding is that, when a cause of action is inferred from a federal statute that also contains an express cause of action and an express limitations period, the courts must look first to that statute and, indeed, the inquiry should normally end there. *Id.* at 359. Because this is the part of *Lampf* that was joined by a majority of the Court, because this analysis would explain *DelCostello* as well (the DFR having been inferred from the NLRA), and because under petitioners' reading *Lampf* would *sub silentio* have overruled 165 years of precedent making state statutes the primary source for borrowing, *Lampf* should be read as limited to statutes, like the securities laws and the NLRA, that create both inferred and express causes of action.

In addition, petitioners' "practicalities of litigation" argument is replete with lamentations about the possibility

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[14] Contrary to North Star's brief, at 12, the dissenting opinions of Justices O'Connor and Kennedy do not suggest that they agreed with this part of the opinion.

that, under a two or three year statute of limitations, evidence may disappear, potential plaintiffs may be harder to find to pay them their damages, parties may be harder to serve, and the like. Again, even assuming that this is a serious problem — and we explain below why it is not — it affects most federal causes of action to which the *DelCostello* presumption nevertheless applies. No doubt, all defendants would like to have the benefit of a six-month limitations period because it protects them sooner against allegations of unlawful conduct and reduces their record-keeping needs, but invocation of this concern does not help distinguish between those federal causes of action that ought to follow the normal rule of borrowing from state law, and those which ought to be brought within the exception.

Indeed, only two "practicalities" have been held by this Court to warrant departure from the normal rule of borrowing from state law — the prospect of lengthy wrangling over the proper limitations periods for federal statutes that include a wide variety of causes of action (as in the case of RICO), and the danger of interference with the administration of CBAs (as in the case of hybrid DFR actions). Because petitioners do not, and cannot, contend that either danger is present here, that is sufficient to warrant rejection of their arguments for borrowing from federal law.

Finally, petitioners suggest that the Court should borrow the six-month limitations period because some federal labor statutes have express six-month periods. North Star Br. 27-28; Crown Cork Br. 27-28. *See also* Chamber Br. 16. As we explain *infra* at 32-33, this argument is predicated on a highly selective and unrepresentative citation of express limitations periods among federal employment statutes. But the biggest flaw in the argument is that it ignores this Court's admonition that the principle of borrowing from state law remains the norm, "in labor law as elsewhere." If petitioners desire a uniform six-month statute of limitations for labor cases, they must ask Congress, not this Court, to create one.

## B. The NLRA Is Not Analogous to WARN.

**1. Different Purposes.** Petitioners contend that WARN's purpose is comparable to that of the NLRA, thus warranting the borrowing of the NLRA's six-month limitations period. In fact, the purposes of the two laws are quite different. The purposes of the NLRA are well-described in its preamble: to achieve long-term industrial peace, and prevent disputes between labor and management from becoming so serious as to cause constant industrial warfare, by encouraging workers to choose unions to represent them in collective bargaining, and by requiring employers to bargain in good faith with the workers' chosen representative. 29 U.S.C. §§ 141(b), 151. The method chosen by Congress was not to set minimum employment standards, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-756 (1985); indeed, the NLRB is forbidden to require the parties to agree to any particular set of terms and conditions of employment. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Instead, Congress' strategy in the NLRA was to encourage the practice of collective bargaining, *id.*, and to prevent all parties from acting in ways that are inconsistent with such bargaining. *Emporium Capwell Co. v. Western Add'n Cmnty. Org.*, 420 U.S. 50 (1975).

WARN, by contrast, promulgates a substantive standard of conduct for employers, and grants rights to all employees, regardless of whether they join a union or engage in collective bargaining. Under the Act, before employees suffer an employment loss from the closing of an entire plant, or the layoff of a substantial number of workers at a plant, they are entitled to notice of the proposed action. As explained in the Labor Department's implementing regulations, WARN

> provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closing and mass layoffs.

20 C.F.R. § 639.1 (1993).

Because it is a minimum labor standard, rather than a pro-collective bargaining statute, it makes no sense to borrow a limitations period that was intended to govern claims relating to the bargaining process and labor relations.

This Court has specifically invoked that difference in recognizing the distinction between the purposes of plant closing statutes and of the NLRA. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the issue was whether the NLRA preempted a Maine statute, comparable to WARN, that required employers to give prior notice of plant closings. The Court ruled that "the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining," *id.* at 20, and thus held that the NLRA, being directed at a different purpose than the state law, did not preempt the Maine statute.

Moreover, as the court pointed out in *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51 (2d Cir. 1993), far from being solely a labor statute, as the NLRA is, WARN protects communities as well as workers. As the Act's sponsors recognized, both communities and workers pay a heavy price for the dislocation that follows a surprise plant closing, as taxpayer expenses for unemployment compensation and welfare mount, and workers lose their ability to spend money at community businesses and to pay their mortgages to community financial institutions. *See* 134 Cong. Rec. 15514 (Sen. Byrd), 16690-16691 (Sen. Warner). That is why WARN requires employers to give notice to the chief officer of the affected unit of local government, as well as to the state's dislocated worker agency, 29 U.S.C. § 2102(a)(2), and gives local governments a right to receive $500 for each day that notice is withheld. 29 U.S.C. § 2104(a)(3). Indeed, the statutory provision under which respondents sued here is the very one that entitles local governments to sue, 29 U.S.C. § 2104(a)(5). It is evident that the cause of action for local governments bears no

resemblance to the NLRA, so that there would be no justification for making **them** sue within six months. Nor is it likely that Congress intended the same cause of action to have one limitations period borrowed from federal law, and another from state law, depending on whether the plaintiff was a worker or a municipality. *Cf. DelCostello v. Teamsters*, 462 U.S. 151, 169 n.19 (1983) (refusing to use analogies that would result in different limitations periods against different defendants). For this reason as well, the NLRA is not an analogous statute from which the statute of limitations should be borrowed.[15]

Petitioner Crown, Cork also quotes from committee reports to support its argument that WARN's notification requirement was intended to affect collective bargaining over plant closings. Br. 17. This legislative history analysis is highly distorted. As Crown, Cork acknowledges, a bargaining requirement was included in an early bill, but was deleted in order to secure passage. When the House Report was written, the bill still required employers both to bargain with unions over plant-closings and to provide unions with detailed information about the reasons for the closing (which, in turn, the union might have used to bargain for alternatives

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[15] In arguing that WARN and the NLRA have the same purpose, petitioners invoke a reference in the NLRA's preamble to benefits that the community receives from the proscription of certain managerial practices. *E.g.*, North Star Br. at 19. We do not doubt that every labor statute is intended by Congress to benefit the community as a whole, but to compare purposes at that level of generality is simply to trivialize this aspect of the test. Similarly, North Star's assertion, Br. at 22-23, that the purposes of the statutes are similar in that both affect labor-management relations, shows only that both are labor laws. This argument does not serve to distinguish WARN from most federal labor laws (such as those in *Reed*), and so is inconsistent with this Court's insistence that state law borrowing is the norm "in labor law as elsewhere."

to the closing). Crown, Cork's blocked quotation, supposedly about the purpose of "prenotification," actually begins the section of the House Report captioned "THE DUTY TO CONSULT," H.R. Rep. 285, 100th Cong., 1st Sess. 32 (1987), which, as noted, was never enacted.

Similarly, the Senate Report quoted by Crown, Cork supported a version of the bill from which the duty to consult had been eliminated, but which still contained the duty to provide information to the union. S. 538, Section 333, 100th Cong., 1st Sess. (1987). But this section was also deleted from the bill in order to secure passage, and the Act that remained had neither of the provisions to which these reports referred as encouraging bargaining.[16]

In further support of its argument that WARN is analogous to the NLRA, petitioners rely on the fact that some WARN provisions make express reference to the NLRA. But many of the provisions they cite simply confirm how disparate the two laws are, because they show the lengths to which Congress went to keep WARN from having any impact on the collective bargaining process that the NLRA is intended to foster. *E.g.*, 29 U.S.C. § 2103(2) (WARN does not cover economic action protected by NLRA); 29 U.S.C.

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[16] Petitioner North Star cites Senator Hatch's assertion that WARN was, in effect, an amendment to the NLRA, to show that WARN is analogous to the NLRA. Br. at 21, *citing* 134 Cong. Rec. 15923, 15924 (1988). North Star neglects to mention that Senator Hatch voted against WARN, *see* 134 Cong. Rec. 16691 (1988), and that the speech that North Star quotes was given in support of the unsuccessful Kassebaum amendment, which would have eliminated its application to layoffs. 134 Cong. Rec. 16020-16021. The theme that WARN amended the NLRA was a constant one in Senator Hatch's arguments against the bill, *see* 134 Cong. Rec. 15763, 15764 (1988), but he failed to persuade a majority of the Senate of this point. It is a cardinal rule of statutory construction that statements by a bill's opponents are accorded little weight. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988).

§ 2108 (giving notice under WARN cannot violate NLRA). Other provisions simply incorporate into WARN the definitions used by the NLRA for basic terms. *E.g.*, 29 U.S.C. § 2101(a)(4).

Moreover, as *amicus* Chamber of Commerce concedes, Br. 9-10 n.8, many labor statutes, including the LMRDA and the Age Discrimination in Employment Act, incorporate NLRA definitions and are to some extent interpreted *in pari materia* with it. *E.g.*, *Machinists Lodge 702 v. Loudermilk*, 444 F.2d 719, 722 (5th Cir. 1971) (invoking NLRB precedents to decide whether LMRDA lets union impose fines for dual unionism). And yet in *Reed*, the Court applied the normal rule of borrowing from state law to the LMRDA, expressly rejecting borrowing from the NLRA. Thus, the fact that some WARN provisions refer to the NLRA does not support the conclusion that the NLRA is clearly more analogous to WARN than any state cause of action.

**2. Different Procedures.** In *Malley-Duff*, the Court relied in part on the strong similarity between the enforcement procedures of RICO and the Clayton Act in ruling that the two were closely analogous. WARN, of course, must be enforced by a private lawsuit in district court, unlike the NLRA where a private party need only file a charge form, in very general language, asking the NLRB's General Counsel to pursue an administrative complaint on his behalf. Although this difference was not enough to preclude borrowing section 10(b) in *DelCostello*, where the other reasons for borrowing federal law were so compelling, this difference in procedures surely militates against the conclusion that the two claims are so analogous that Congress must have intended that the Court depart from the normal rule of borrowing state law.

**3. Different Causes of Action.** Petitioners argue that WARN is analogous to section 8(a)(5) of the NLRA, which requires employers to bargain in good faith with the union representing its employees. Although WARN does not

include any duty to bargain, petitioners seize on the fact that one item about which employers must sometimes bargain is the effects of a plant closure (or, depending on the text of the collective bargaining agreement, over the closure decision itself). *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981); *Milwaukee Spring*, 268 NLRB 601 (1984), *enf'd sub nom. UAW Local 547 v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985). This duty, in turn, requires the employer to inform the union of its plans in sufficient time to permit meaningful bargaining. *Gar Wood-Detroit Truck Equipment*, 274 NLRB 113 (1985).

What this argument ignores — apart from the major differences between the NLRA duty and WARN's requirements — is that such a duty exists **only** when the workers are represented by a union and the duty has not been waived by the union. The reason for this limitation is that the duty to bargain is owed only to a union, and not to individual employees. 29 U.S.C. § 158(a)(5). But only 11.5% of all private sector employees are union members. Bureau of National Affairs, *Proportion of Union Membership Hits 15.8%* [including public employees], 142 Labor Relations Reporter 180, 181 (February 15, 1993). Thus, if the NLRA is analogous to WARN for limitations purposes, just because a small fraction of all possible WARN employee-plaintiffs (not including respondents here) enjoy limited protection under the NLRA, then the tail would indeed be wagging the dog.

Petitioners attempt to rebut this point by asserting that the NLRA protects both represented and unrepresented employees. Crown, Cork Br. 19-21; North Star Br. 24-25. In fact, however, the vast bulk of the NLRA is concerned solely with the certification of union representatives for bargaining units and the supervision of the process of collective bargaining. In practical terms, only one aspect of the NLRA applies to union and non-union employees alike — the section 7 right to engage in "concerted activities . . . for mutual aid and protection," retaliation for which is a ULP

under section 8(a)(1). For this reason, it is not surprising that every one of the cases cited by petitioners for the proposition that the NLRA applies whether or not there is a union involves this particular ULP.

Significantly, petitioners do not contend that WARN bears any resemblance to section 8(a)(1)'s protection of concerted action, the only ULP that they cite as applying to union and non-union employees alike. Rather, they draw an analogy only with section 8(a)(5)'s duty to bargain **with the union**. Petitioners do not pretend that **this** ULP applies to nonunion employees, and we know of no precedent that so holds. Accordingly, our argument that the section 8(a)(5) ULP not only fails to resemble the WARN cause of action, but also applies to only a small fraction of all WARN plaintiffs, stands unrefuted.

The argument that this one limited parallel with the NLRA suffices to make the two statutes "closely analogous" for borrowing purposes is completely inconsistent with this Court's precedents. For example, in *Reed*, the Court acknowledged that one small class of suits under Title I of the LMRDA might directly implicate challenges to collective bargaining agreements, and thus closely resemble DFR actions; but that was not sufficient reason to extend the application of section 10(b) to actions under the LMRDA generally. 488 U.S. at 331-332 n.6. Similarly, when this Court decided *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), one small fraction of the claims that could be brought under 42 U.S.C. § 1983, and a larger fragment of claims under 42 U.S.C. § 1981, could be brought under Title VII of the Civil Rights Act of 1964. Yet that was no reason for this Court to borrow Title VII's 180-day limitations period to govern claims under these civil rights statutes. So, too, the fact that some WARN plaintiffs may have NLRA protection should not affect the selection of the limitations period.

There is another respect in which North Star's NLRA analogy is inconsistent with precedent: this Court has held

that a mere "family resemblance" between a federal statutory claim and some aspect of the NLRA is insufficient to warrant adoption of section 10(b). Rather, there is sufficient similarity between the NLRA and the federal claim **only** when the claim directly challenges the private resolution of a dispute between a union and an employer, and thus implicates the long-term bargaining relationship between the two. *Reed v. UTU*, 488 U.S. 319, 331 and n.6 (1989); *Doty v. Sewall*, 784 F.2d 1, 9, 10 (1st Cir. 1986).

As we more fully discuss below, that is surely not the case here. Not only does WARN apply regardless of whether there is a union involved, and regardless of whether the union and employer have tried to resolve any dispute about the plant closing, but any rights that even union members may enjoy under the NLRA are in addition to their WARN rights, as WARN expressly provides. 29 U.S.C. § 2105. Consequently, even if a union and employer reach an agreement about the closing, and employees nevertheless mount an attack on the employer's compliance with WARN, they are enforcing independent rights, not attacking the dispute resolution itself. *Cf. Barrentine v. Arkansas-Best Freight Lines*, 450 U.S. 728 (1981).

**4. Different Relief.** Not only the purposes, procedures, and cause of action, but also the relief available under the NLRA, is very different from WARN. If the NLRA is violated in connection with a plant closing or layoff, the NLRB may issue an order requiring the company to bargain with the union. *Stevens Pontiac-GMC*, 295 NLRB 599, 603 (1989). Employees who have been laid off may be entitled to reinstatement to their positions. *North Carolina Coastal Motor Lines*, 219 NLRB 1009, 1009-1010, 1015 (1975), *enf'd*, 542 F.2d 637, 638 (4th Cir. 1976). The NLRB may require the employer to offer the affected workers positions at other plants, *Royal Norton Mfg. Co.*, 189 NLRB 489, 489, 495 (1971), or even, in some cases, to reopen an operation pending the completion of the required bargaining with the union. *Florida-Texas Freight. Corp.*, 203 NLRB 509,

511 (1973), *enf'd mem.*, 489 F.2d 1275 (6th Cir. 1974). In theory, preliminary relief may be granted under section 10(j), ordering an employer not to close the plant in the first place. The employees are also awarded back pay, but not from the date of the closing; rather, a formula has been developed that is intended to encourage an employer to bargain in good faith once the Board has ruled, although interim earnings and various other sums may be deducted. *Transmarine Navig. Corp.*, 170 NLRB 389 (1968).

WARN relief is quite different. First, WARN expressly forbids injunctions against a plant closing or layoff, 29 U.S.C. § 2104(b), a bar which, *a fortiori*, prevents an order that a plant be reopened. There is no role for collective bargaining of WARN rights, and so that relief, as well as reinstatement to employment, is unavailable. The only relief for employees is an award of damages, which are calculated very differently than under the NLRA. Thus, although the employees' wages and benefits provide the measure of the damages for each day on which required notice was not given, 29 U.S.C. § 2104(a)(1), there are no offsets for unemployment compensation, wages from other employers, or payments otherwise owing to employees at the time of shutdown. 29 U.S.C. § 2104(a)(2); H.R. Conf. Rep. No. 100-576, 100th Cong., 2d Sess. 1053 (1988). The NLRB has unanimously distinguished WARN payments from the backpay obligations that an employer may owe under its *Transmarine* doctrine, precisely because the two kinds of payments have such different purposes under the statute. *Times Herald Printing Co.*, 315 NLRB No. 100, 147 LRRM 1281, 1283-1284 (1994). There is also authority that employees need not show on which days during the period of withheld notice they would in fact have worked, as the NLRA would require. *USWA v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993). *Contra, Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275, 1286 (5th Cir. 1994).

### C. The Six-Month Limitations Period Is Not Needed to Protect Federal Labor Policies, and Its Adoption Could Easily Frustrate WARN's Own Policies.

Petitioners' argument also fails because they cannot show that "the federal policies at stake and the practicalities of litigation make [section 10(b)] a **significantly more appropriate** vehicle." *DelCostello*, *supra*, 462 U.S. at 171-172 (emphasis added).

#### 1. Section 10(b) Is Not Needed to Effectuate Federal Policies.

Petitioners invoke two federal policies which, they say, are imperiled unless a federal limitations period is borrowed. The first is the interest in avoiding the forum-shopping and needless litigation which, they assert, would necessarily result from borrowing state limitations periods. However, as Part II(A) of this brief explains, this argument, if accepted, would **always** forbid the borrowing of state limitations periods. Rather than distinguishing WARN from most other federal statutes, it emphasizes what most federal laws have in common — they apply to defendants that operate in many different states, each of which has its own limitations periods. The argument thus amounts to a request that the presumption in favor of state borrowing be overruled. *See infra* 43 to 46.

Petitioners also argue that borrowing state limitations periods would harm a supposed federal policy favoring prompt resolution of employment-related disputes. To the extent that this supposed policy applies to all federal labor statutes, it cannot support borrowing from federal law because it proves too much — it always requires borrowing section 10(b). *See* pages 19 to 22, *supra*.

But petitioners also err in asserting that Congress has generally imposed extremely short limitations periods in

labor cases. In this regard, their citation of the limitations periods for employment discrimination and federal employee claims scarcely exhausts the express limitations periods that Congress has enacted to govern claims by employees against their employers. Indeed, other federal employment statutes have substantially longer express limitations periods. For example, the Portal-to-Portal Pay Act, 29 U.S.C. § 255, provides a two-year limitations period for seeking unpaid wages under the Fair Labor Standards, Walsh-Healey, or Davis-Bacon Acts (or three years for willful violations). Similarly, the Railway Labor Act allows two years for suits to vacate NRAB awards, section 3, First (r), 45 U.S.C. § 153, First (r), and six years are allowed to sue fiduciaries under the Employee Retirement Income Security Act, 29 U.S.C. § 1113. Moreover, railroad and maritime workers are given three years to sue their employers over on-the-job injuries, 45 U.S.C. § 56; 46 U.S.C. § 688.

The one thing that all federal six-month limitations periods have in common is that they define the time in which an employee must file a charge with an agency, which the agency then investigates on the employee's behalf. The longer statutes set forth the time in which an employee must find a lawyer, do the necessary investigation to satisfy Rule 11, and file suit in court.[17]

Nor, indeed, do this Court's precedents support the proposition that six-month limitations periods are generally desirable for cases involving the rights of employees, or even generally for cases that may have an effect on the collective bargaining process. After all, it was not mere interference with collective bargaining in some general sense that motivat-

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[17] Similarly, almost every one of the short state limitations periods for employment discrimination claims cited in Crown, Cork's brief at 28 n.13, sets the time for filing a charge with a state agency, not for filing suit.

ed the Court in *DelCostello*, but rather the overturning of union-employer dispute resolutions:

> the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union . . . This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later.
>
> 462 U.S. at 169, *quoting UPS v. Mitchell*, 451 U.S. 56, 63-64 (1981).

But, as shown in the previous section of this brief, WARN claims do not attack arbitral awards nor otherwise challenge union-employer agreements, and hence this rationale is inapplicable.

Petitioners also assert that WARN itself expresses a policy in favor of rapid enforcement, primarily in a provision that exempts employers from paying the $500 per day penalty to local government units if they make their WARN payments within three weeks of a plant closing. We certainly agree that it is better if employers meet their obligations promptly after failing to give notice, and we assume both that Congress wanted employers to do so and that, in most cases, employees will promptly sue as soon as it is clear that a WARN violation occurred.

But the statute of limitations does not determine the time within which employers will give notice of a plant closing; it only determines, once an employer has failed to meet its obligations in a timely manner, the amount of time its employees have to sue for redress. Once an employer has

failed to honor its obligations under WARN, there is nothing in the statute or in the underlying policies that favors the speedy resolution of disputes that is at all comparable to the need for industrial peace on which *DelCostello* relied. Indeed, an unduly short limitations period would make it far more difficult for employees, especially unrepresented employees who do not have a union with experienced officers and counsel looking out for their interests, to secure enforcement of the duties that WARN imposes on employers. The ultimate result will be less compliance with WARN, not more timely compliance.

Finally, petitioners contend that, because WARN may involve companies that are going out of business, there is a particular danger that records and witnesses may disappear if suit has not been brought within six months. However, the evidence that will be needed to defend a case will largely be records that are in the company's possession already, and it is not every company that closes a plant or lays off many employees that must keep records for WARN purposes — only those that fail to give notice at least sixty days beforehand must do so. Moreover, companies must still maintain their financial records at least for the limitations period of the tax laws and, probably, the securities laws, inasmuch as a company in financial difficulty causing plant closures may have exposure to suits under Rule 10b-5. And, as North Star concedes, federal wage and equal employment laws require employers to keep detailed payroll records for at least three years. Br. 32 n.15.

What is more, even if the NLRA's six-month limitations period were borrowed to govern claims by employees, it is inconceivable that the same period would be held most analogous to claims brought by local governments to collect the statutory $500 per day civil penalty. The claim may well be governed by the express five-year limitations period for civil penalties under 28 U.S.C. § 2462; it is also closely analogous to Pennsylvania's two-year limitations period for actions under a civil penalty statute. 42 Pa. Cons. Stat. Ann.

§ 5524(5). In either case, employers would have to retain their relevant records for well over six months, and thus petitioners' final argument fails to justify a six-month limitations period for WARN actions by employees.

### 2. Adoption of Section 10(b) Would Make It Difficult to Enforce WARN.

Far from being needed to effectuate federal policy, the use of section 10(b) would harm the policies underlying WARN, because a six-month limitations period is too short to permit many WARN claims to be brought. There are two reasons for such concern.

First, workers, unions and communities that consider bringing a WARN action must confront a number of issues. *See generally* McHugh, *Fair Warning or Foul? An Analysis of the [WARN] Act in Practice*, 14 Berkeley J. Emp. & Labor Law 1 (1993). If an entire plant has been permanently closed, their task is relatively simple: they must only ascertain the original number of employees, 29 U.S.C. §§ 2101(a)(1) and (2), with due regard for the number of hours worked by part-time employees, § 2101(a)(8). But if the plant continues in operation, potential plaintiffs also must assess the number and percentage of employees laid off over any thirty or ninety day period, 29 U.S.C. §§ 2101(a)(3), 2102(d), taking into account the number of employees who have been offered transfers to other locations. 29 U.S.C. § 2101(b). Even assuming that a union could use its rights under section 8(a)(5) of the NLRA to obtain such information soon enough to decide within six months whether a suit is warranted, unrepresented employees are unlikely to have any access to it. Moreover, WARN affords a variety of defenses related to considerations of reasonable business and legal judgment, as well as, in the case of partial closures, the employer's foresight about the likelihood of future layoffs at the time an initial layoff is imposed, as well as concerning

the likely duration of the initial layoff. *E.g.*, 29 U.S.C. §§ 2102(b), 2103(1).

Second, if the employer does not announce at the outset that the layoff or closing is permanent, prospective plaintiffs must make the judgment whether the layoff is likely to last more than six months. Moreover, workers who are hopeful that, if the plant does reopen, they will be among the group selected to go back to work, may be leery of suing their employer until they are sure that their jobs have, in fact, been eliminated. In this case, for example, North Star initially took the position that its layoff was indefinite, and hopefully temporary, and it steadfastly refused to clarify the matter despite repeated inquiries from respondent Thomas. Employees put in this position should not be required to be mind-readers in deciding whether to rush into court before the expiration of six months after the layoff began. The borrowing of section 10(b) would require the employees and their counsel to obtain the necessary information, make such calculations, and file a complaint in compliance with Rule 11 of the Federal Rules of Civil Procedure within a mere six months.

Petitioners make light of this issue, North Star Br. 29, arguing that a number of plaintiffs have been able to sue within six months, and that the only questions are whether there was a lay-off, when notice was given, and how many employees were involved. But there are also a large number of cases in which plaintiffs have not sued that soon, because, as we showed above, there are a number of questions that may not be as easy for individual employees to answer as it presumably is for sophisticated labor counsel retained by larger employers. Even petitioners' own briefs make clear that far more may be involved. For example, they are at pains to show that WARN courts have adopted NLRB standards, applied in election eligibility cases, for deciding whether particular employees have a reasonable expectation of recall and therefore are on only temporary layoff. North Star Br. 21, *citing Damron v. Rob Fork Mining Corp.*, 945

F.2d 121, 124 (6th Cir. 1991). As this case makes clear, that determination turns on a variety of criteria that themselves depend on data to which individual employees are not likely to have access. There is a real danger that adoption of a six-month limitations period within which workers would have to ascertain such information, find counsel, and file suit could cripple enforcement of WARN, which provides yet another reason why the judgment below should be affirmed.

* * *

In *DelCostello*, the Court was troubled that a limitations period of a few months might be too short a time to bring suit. However, impelled to choose between time periods even shorter than six months that would endanger the enforceability of the DFR, or lengthy periods that might seriously threaten federal labor policies favoring the finality of grievance settlements, it opted for section 10(b) because the analogy between the NLRA and the DFR was so close. 462 U.S. at 169. Here, by contrast, as we showed *supra* at 23 to 31, the analogy to the NLRA is tenuous at best, and as we showed *supra* at 32 to 36, federal labor policies will not be endangered by a limitations period measured in years rather than months, but adoption of a six-month period would endanger WARN's own policies. *Supra* 36 to 38. Accordingly, the "exceptional" case for borrowing federal rather than state law simply has not been made. Indeed, even if there were no strong presumption, the analogies and equities still favor borrowing from state law.

## III. THIS ACTION WOULD BE TIMELY BASED ON ANY OF THE ANALOGOUS STATE OR FEDERAL LIMITATIONS PERIODS.

If the Court chooses to decide in this case what the proper state limitations period for WARN actions, despite the fact that petitioners deliberately did not present that question, just as they avoided that question below, the best choice among state limitations periods is the one chosen by a

number of federal courts for WARN — state law statutes governing actions on contract.[18] In Pennsylvania, this would allow four years if the contract is deemed either implied in law or based on an agreement not in writing. *See* 42 Pa. Cons. Stat. Ann. § 5525(3) or (4).

The reason for borrowing a contract limitations period is not that WARN arises from an actual agreement between the parties; petitioners are clearly correct that the duty is imposed by statute. Nevertheless, employees and employers have a contractual relationship, whether under a CBA governed by federal law or by the state's common law, and WARN imposes a additional duty on the parties' contractual relationship. *Cf. McDonald v. Thompson*, 184 U.S. 71, 74 (1902) (liability imposed on contractual relationship by federal law should be characterized as either implied contract or obligation imposed by statute).

Courts have sometimes borrowed contractual limitations periods to govern other federal statutes that govern a contractual relationship. *E.g.*, *Dantagnan v. ILA Local 1418*, 496 F.2d 400 (5th Cir. 1974). Moreover, the statutory remedy limits the employees to damages measured by the contractual wage rate, and excludes the sort of damages that are commonly available in tort, such as emotional or punitive damages.

Another possible choice is the three years allowed by 43 Pa. Stat. Ann. § 260.9a(g) for suing under the Pennsylvania Wage Payment and Collection Law ("WPCL"). Because employees' wage rates provide the measure of damages for claims under WARN, the WPCL provides a sound analogy to the WARN cause of action. The Third Circuit has previously adopted that limitations period for the enforcement

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[18] *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51, 57 (2d Cir. 1993); *Frymire v. Ampex Corp.*, 821 F. Supp. 651, 655 (D. Colo. 1993); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 196-197 (E.D. Mich. 1993).

of claims for unpaid pension contributions under a CBA. *Connors v. Consolidation Coal Co.*, 866 F.2d 599, 603-604 (1989).

A third alternative is the six-year period allowed by the Pennsylvania residual statute of limitations, which applies "to any civil action or proceeding which is [not] subject to another limitation specified in this subchapter." 42 Pa. Cons. Stat. Ann. § 5527. Crown, Cork argues that *Agency Holding Corp.* bars the borrowing of such a limitations period, but given Congress' subsequent enactment of a four-year residual limitations period for federal statutes, it is hard to understand why there should be any presumption that Congress disfavors residual **state** limitations periods. Moreover, this Court has borrowed such statutes in other cases, *Corsicana Nat'l Bank v. Johnson*, 251 U.S. 68, 85-86 (1919), including, most recently, in *Owens v. Okure*, 488 U.S. 235 (1989). And the lower courts have continued to borrow residual limitations periods when other state analogies have been inappropriate. *E.g.*, *Teumer v. General Motors Corp.*, 34 F.3d 542, 548 (7th Cir. 1994); *SEIU v. City Cleaning Co.*, 982 F.2d 89, 95 (3d Cir. 1992) ("it encompasses any cause of action — either federal or state — for which a limitation has not been expressly created by the legislature or by Congress"). Thus, if no other state limitations period will do, the Court should borrow section 5527.

A final possible state analogy is with Pennsylvania's two-year limitations period for enforcing civil penalties. 42 Pa. Cons. Stat. Ann. § 5524(5). WARN damages operate, at least in part, as a civil penalty. This is especially true for communities, which are entitled to $500 per day regardless of the amount of wages involved; indeed, the most analogous limitations period for this cause of action is either the state or the federal limitations period for civil penalties. But the employees' cause of action also has an aspect of both deterrence and punishment of employers who fail to provide 60 days' notice of a shut-down. Thus, although WARN damages have a compensatory aspect, they are not entirely

compensatory, because Congress made a considered decision not to impose any duty to mitigate on employees, or to reduce their recovery according to whether and to what extent they sustained "actual damages" because they might not have worked on some of the sixty days in question, or because they actually found employment for part of the sixty days. Instead, the only way for employers to limit their exposure to WARN damages is through a demonstration of good faith, either in the commission of the violation itself, or the provision of unconditional and voluntary benefits to employees denied notice. 29 U.S.C. §§ 2104(a)(2) and (4). These factors are related more to deterrence than to compensation of employees for actual harm.

The fact that none of these possible limitations periods may provide a perfect analogy is not surprising, because states rarely enact their limitations periods with federal statutes in mind. As the Third Circuit said in explaining its decision to borrow the six-year residual limitations period in section 5527(6) to govern retaliation claims under section 510 of ERISA,

> the *DelCostello* Court emphasized that "federal courts should [not] eschew use of state limitations periods anytime state law fails to provide a **perfect** analogy." 462 U.S. at 171 (emphasis added). The Court recognized that "there is not always an obvious state-law choice for application to a given federal cause of action." *Id.* Nevertheless, the Court concluded that "resort to state law remains the norm for borrowing of limitations periods." *Id.* Thus, only if "a rule from elsewhere in federal law **clearly** provides a closer analogy," *id.* at 172 (emphasis added), may we "turn away from state law." *Id.*

*Gavalik v. Continental Can Co.*, 812 F.2d 834, 847 (3d Cir. 1987) (emphasis in original; parallel citations deleted).

However, if the Court finds that none of the available state law analogies is adequate, there remain federal limitations periods that are far more appropriate for borrowing than section 10(b). The best alternative is section 6 of the Portal-to-Portal Pay Act, 29 U.S.C. § 255, that allows two years to seek unpaid wages under the Fair Labor Standards, Walsh-Healey, and Davis-Bacon Acts.

Like the WARN Act, the statutes governed by section 255 provide minimum labor standards, rather than being directed to the encouragement of collective bargaining. Like WARN, the FLSA and other statutes provide almost exclusively for monetary relief (the FLSA does prohibit retaliation against employees who enforce their FLSA rights, but that aspect of the statute is clearly ancillary to the main subject of the law). Like WARN, the overtime provisions of the FLSA impose monetary obligations measured by whatever wage rates are agreed between the employer and its employees (*i.e.*, 150% of the wage rate for the first 40 hours worked in each week), even though the statute requires payments that are excused by the contractual relationship itself. Like WARN, section 255 provides reduced financial exposure — a two-year limitations period, rather than three years — for employers whose mental state is less culpable. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1986). As in *Agency Holding Corp.*, where similarities in the remedial structure of RICO and the antitrust laws provided a reason to borrow the Clayton Act's limitation period to govern RICO, these remedial similarities support borrowing section 6 to govern WARN, if any federal limitations period is borrowed.

Perhaps most important, section 6, like WARN, was designed as an appropriate time for employees to find a lawyer and file a complaint in federal court, not just to file a simple charge form with a federal agency whose employees

are charged with helping employees and investigating their charges for them. Although this Court found it appropriate in *DelCostello* to borrow section 10(b) where there was no other federal law alternative, and where its six-month period actually represented a longer time than the existing state law analogue, that does not make section 10(b) the best choice when other state and federal limitations periods are available.

## IV. THE COURT SHOULD NOT REVERSE 165 YEARS OF PRECEDENT BY CREATING A PRESUMPTION IN FAVOR OF BORROWING FEDERAL LAW.

Presumably because it recognizes that the case cannot be made for borrowing section 10(b) under prevailing standards, petitioner North Star asks the Court to overturn those precedents. It asserts that Congress has expressed its desire to abandon state law borrowing, and that such borrowing both foments litigation over possible state limitations periods, and creates uncertainty among potential litigants who may be sued in different forums. However, "[t]ime and again this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law,'" *Hilton v. South Carolina Pub. Ry. Comm.*, 502 U.S. 197, 202 (1991), which has "special force in the area of statutory interpretation," *id.*, Neither of petitioner's arguments provides the "compelling justification" that is needed to reverse such longstanding precedent. *Id.*

We acknowledge that a presumption in favor of borrowing from federal law does have the advantage of creating uniform limitations periods for suits filed in every state under any given federal statute. On the other hand, because many federal claims have state law analogues, a given litigant may have parallel claims under both state and federal law, and it is desirable for both sets of claims to expire at the same time. Under North Star's proposal, that result would not occur, thereby causing a problem of

increased significance given Congress recent enactment of the supplemental jurisdiction provisions of 28 U.S.C. § 1367. Even if North Star's arguments might have force if the Court were writing on a clean slate, that is not the situation.

Thus, when WARN was enacted in 1988, the Court had held for almost 160 years that borrowing from state law is the rule, and choosing a federal limitations period the very narrow exception. The Court had also said, as recently as 1987, that it was fair to assume that Congress intended by its silence to have the Court borrow from state law. *Agency Holding Corp. v. Malley-Duff Assoc.*, 483 U.S. at 147. Against this background, it is fair to assume that Congress intended the limitation period for WARN to be developed according to the same standard.

Nor is there any merit in North Star's argument that Congress' intent in enacting a four-year residual limitations period for statutes taking effect after 1990, 28 U.S.C. § 1658, frees the Court to rewrite 165 years of precedent and apply a six-month limitations period to WARN. North Star relies on an analysis that was placed in the Congressional Record by Senator Grassley, 136 Cong. Rec. 17581 (1990), which explained that, under existing doctrine, "federal courts 'borrow' the most analogous state law limitations period"; according to the analysis, this rule has the disadvantage of obligating courts to determine the applicable period, producing disagreements among the federal courts, and leaving litigants uncertain until consensus is reached. This excerpt not only shows Congress' belief that it was **state law** periods that were being borrowed, but Congress' failure to alter this approval shows that it recognized and was willing to accept the fact that it is state law that is being borrowed. It is the very need to borrow that Congress wanted to fix, and then only for newly created causes of action.

In this regard, there is a great irony in North Star's proposal that the Court rewrite precedent based on the intent underlying 28 U.S.C. § 1658. Normally, courts consider legislative history in trying to construe the statute that was

being discussed, although there is controversy within the Court about the extent to which such materials should be considered. But North Star has no interest in having section 1658's four-year limitations period applied to WARN.

Even more important, North Star ignores the reason why Congress decided not to apply the law that was the product of this analysis to existing statutes. According to the House Report No. 101-734, the limitations periods for many statutes had already been resolved by the Courts, and imposing a new limitations period for all these laws "would threaten to disrupt the settled expectations of a great many parties." 1990 U.S. Code Cong. & Admin. News 6870. If this Court overturned the many years of precedent on which lower courts and parties have relied in reaching the general consensus that prevails with respect to the limitations periods for most federal statutes, the result would be to produce the very disruption that Congress sought to avoid.

To be sure, there are some federal causes of action — WARN among them — on which this Court has not pronounced judgment and for which no consensus has yet emerged among the lower courts. But the minor benefits that would allegedly be produced in reducing the amount of limitations litigation under those statutes by the adoption of a federal borrowing presumption is far outweighed by the strife that would be caused under the great majority of pre-1991 laws whose limitations periods are now generally accepted.

Indeed, if section 1658 is relevant at all, it shows that the speedy resolution of controversies on which petitioners seek to rely was obviously much less significant than they have suggested, and that Congress is not disturbed by the application of a limitations period four years in length. 28 U.S.C. § 1658. Although this statute applies only to laws enacted without an express statute of limitations after December 1, 1990, it has been argued that this four-year period may be borrowed by analogy. Siegel, *Practice Commentary*, United States Code Annotated, Title 28, Judiciary

and Judicial Procedure, §§ 1653 to 1960 at 243 (1994). Indeed, if petitioner North Star is serious in urging the enactment of section 1658 as a reason to apply federal law, then it surely makes sense to adopt the four-year limitations period adopted by Congress in section 1658 in choosing among federal law alternatives.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 94-834

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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NORTH STAR STEEL COMPANY,
*Petitioner,*

v.

CHARLES A. THOMAS, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

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### ARGUMENT

### I. THE COURT'S ESTABLISHED BORROWING DOCTRINE FAVORS APPLICATION OF THE NLRA'S SIX-MONTH LIMITATIONS PERIOD TO WARN.

Respondents' briefs raise every plausible (and not so plausible) distinction between the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN" or "the Act"), and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). However, they completely fail to refute two essential, dispositive tenets of North Star's argument: 1) that the NLRA "clearly provides a closer analogy" to WARN than any available state limitations period; and 2) that "the federal policies at stake and the practicalities of litigation" make the NLRA a "significantly more appropriate vehicle for interstitial lawmaking" in this instance.[1]

#### A. Respondents Present A Distorted View Of The Court's Current Borrowing Doctrine.

Respondents and the government present a remarkably narrow and erroneous interpretation of the Court's limitations borrowing doctrine. They suggest that the doctrine is fundamentally unchanged from 165 years ago, and that it permits the borrowing of federal statutes of limitations in only the most extraordinary of circumstances. *See* Government Br. 11 p.4 (current doctrine is only "slightly different" from approach taken by *McCluny v. Sullivan*, 3 Pet. (28 U.S.) 270, 277-78 (1930)). Indeed, Respondents go so far as to imply that the Court wishes to limit federal borrowing to only three circumstances: "hybrid" duty of fair representation cases, RICO claims, and implied causes of action derived from federal

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[1] *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 148 (1987); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991).

statutes that contain explicit limitations periods. Thomas Br. 22, 30; Steelworkers Br. 12-13.

Respondents' myopic view of the Court's doctrine, however, ignores the "decade-long drift away from the traditional practice of 'borrowing' the statute of limitations of the forum state's most analogous cause of action." *The Supreme Court: 1990 Term—Leading Cases*, 105 Harv. L. Rev. 399, 400 (1991); *see also Halkias v. General Dynamics Corp.*, 31 F.3d 224, 229 n.11 (CA5) ("The 'norm' of borrowing state limitations periods has been subject to steady erosion."), *reh'g en banc granted* (Sept. 22, 1994). Indeed, their contentions overlook the half-century of slow but steady evolution that ultimately led to *DelCostello*'s historic retreat from exclusive state law borrowing.[2]

Respondents contend that the Court's holdings in *DelCostello*, *Agency Holding*, and *Lampf* constitute no more than "narrow exceptions" to the Court's earlier borrowing decisions. Thomas Br. 9. Their plea is to resurrect the superseded tests stated in pre-*DelCostello* cases to bar application of the NLRA limitations period to WARN. What Respondents fail to recognize, however, is that *DelCostello* and its progeny have *substantially broadened* the appropriate application of federal law to set federal limitations periods. By way of comparison, in *DelCostello*, the Court drastically expanded the "narrow exception" *Occidental* test advanced by Respondents, stating that federal courts "may reject a state time limitation *not only* when it is in direct conflict with federal policy, *but also* when the state limitations period is significantly

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[2] *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (recognizing that any limitation of a federal right is a matter of federal, not state, law); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (preempting application of state limitations period for federal common law claim joined with analogous federal statutory claim); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) (state limitations periods could not be applied to federal statutes if they would "frustrate or interfere with the implementation of national policies").

less appropriate than a specific federal alternative." Ellen E. Kaulbach, *A Functional Approach To Borrowing Limitations Periods For Federal Statutes*, 77 Cal. L. Rev. 133, 143 (1989) (emphasis added). It is this modern view of federal borrowing that governs the applicability of the NLRA to WARN—not the highly restrictive test advocated by Respondents.

Unwilling to accept the significance of *DelCostello*—and the Court's subsequent embrace of practical federal borrowing to achieve uniformity in *Agency Holding* and *Lampf*—Respondents dismiss these decisions as aberrations. They then erroneously suggest that the Court's 1989 application of a state law limitations period in *Reed v. United Transportation Union*, 488 U.S. 319 (1989), reflects the Court's "predominant trend." Thomas Br. 12.

In *Reed*, the Court was confronted with the need to select a statute of limitations for actions arising under the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2), a federal provision aimed at protecting union members' free speech and assembly rights. Instead of following pre-*DelCostello* precedent and attempting to uncover some vague analogy to state law, the Court focused on the LMRDA's relationship to other federal laws. After determining that the statute was not really a labor law, but rather had as its "core purpose" the protection of First Amendment rights, the Court decided to apply the same uniform "characterization" that it previously borrowed for another federal statute protecting constitutional rights: 42 U.S.C. § 1983. *Id.* at 326-27. That characterization happened to be to a state statute of limitations—largely because at the time the Section 1983 period was decided, federal law had not been considered as an available alternative. *See Wilson v. Garcia*, 471 U.S. 261 (1985) (Court selected state personal injury statutes to govern uniformly all claims brought under 42 U.S.C. § 1983, without consideration of federal alternatives).

Accordingly, rather than reflecting a "trend" favoring state law borrowing, *Reed* properly is interpreted as

further support for the Court's post-*DelCostello* movement away from *ad hoc* case-by-case state law borrowing—and its corresponding "conflict, confusion, and uncertainty"—and towards creation of uniform limitations periods for federal law. *Wilson*, 471 U.S. at 266. While, in *Wilson*, the Court initially attempted to obtain such uniformity through selection of a single state-law limitations characterization that, in further interests of uniformity, was later applied in *Reed*, the Court quickly recognized the inherent superiority of borrowing *federal* limitations periods to obtain this desired uniformity. *See Agency Holding, supra; Lampf, supra.*[3] It is these two holdings that marry *DelCostello's* suggestion of borrowing "clearly analogous" federal statutes with *Wilson's* preference for uniformity. Indeed, it is *Agency Holding* and *Lampf* that truly represent the Court's "predominant trend."

### B. Respondents Fail To Disprove Petitioner's Contention That The NLRA Provides A Closer Analogy To WARN Than State Law.

#### 1. *The NLRA Provides A Much Closer Analogy.*

In railing against the Section 10(b) limitations period, Respondents repeatedly lose sight of the fact that the Court requires a "closer analogy" to support federal borrowing—not a "perfect" one. *See DelCostello*, 462 U.S. at 172. It is perhaps this purblindness that explains several of Respondents' pointless distinctions between the two acts. For example, Respondents note that in only some instances where WARN notification is required does the NLRA also impose a notification duty upon the employer. Thomas Br. 28. Although this statement is

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[3] The superiority of federal borrowing is amply demonstrated by *Owens v. Okure*, 488 U.S. 235 (1989), in which the Court revisited the § 1983 limitations period issue in order to determine which of several state personal injury statutes should be applied to a particular § 1983 claim. Such confusion would also likely plague any attempt by this Court to select a uniform state limitations period for WARN, given the prevalence of multiple limitations periods in the state statutes that Respondents allege are analogous.

true, it fails to disprove North Star's dispositive contention: that the NLRA provides a *closer* analogy to WARN than any available state statute. Respondents fail, for example, to point to any Pennsylvania statute that provides *any* nexus with a cause of action for failure to receive notification of a workforce reduction.

Curiously, Respondents devote very little effort to buttressing the Third Circuit's primary anti-analogy argument: that WARN is a "substantive" statute, while the NLRA's focus is "procedural."[4] Thomas Br. 23-24; Steelworkers Br. 23-25; Government Br. 16-18. Moreover, none of the Respondents attempts to disprove North Star's principal contention on this point: that the NLRA also creates "substantive" rights, including perhaps the most significant substantive right existing in the labor field—the Section 7 right to engage in concerted activity. *See* North Star Br. 22. Without rebuttal of this critical point, there is scant evidence to support the appellate court's conclusion that WARN and the NLRA are not analogous.

Remarkably, Respondents also try to show that the references to the NLRA in WARN are insignificant and are focused on limiting WARN's effect on collective bargaining. Steelworkers Br. at 26-27 n.21; Thomas Br. 26. Had NLRA borrowing been limited to the explicit provisions contained in the WARN statute, Respondents'

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[4] Respondents' "substantive" argument focuses on the Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), to show that plant closing notification statutes are not analogous to the NLRA. This reliance is misplaced. The statute at issue in *Fort Halifax*, contrary to Respondents' contentions, did not require employers to give prior notice of plant closings. Instead, it provided for the payment of a one-time, lump-sum severance in the event of a plant closing. More fundamentally, the *Fort Halifax* case had nothing to do with the selection of a limitations period for federal law. Rather, the Court was concerned with whether federal law preempted the state lump-sum statute—an issue clearly unrelated to this, or any other, potential WARN matter. *See* 29 U.S.C. § 2105 (WARN does not preempt other statutory rights).

position would be no more than an overstatement. *See* 29 U.S.C. § 2101(a)(4) (incorporating NLRA definition of "exclusive representative" into WARN). However, given the Labor Department's comprehensive borrowing of NLRA provisions for its implementing regulations, and the judiciary's extensive reliance on NLRA principles to shape WARN decisional law, Respondents' position is absurd.[5] *See* North Star Br. 20-21. In contrast, Respondents have failed to point to a single instance where any state law has been called upon to "fill in" a missing provision of WARN.

Finally, Respondents attempt to distinguish between the two federal labor statutes by contending that, unlike the NLRA, WARN has the additional purpose of alleviating the burden caused by job loss on the affected employees' *communities*. Government Br. 20-21; Thomas Br. 25 n.15. However, while WARN does require employers to notify local government of "plant closings" and "mass layoffs," 29 U.S.C. § 2102(a)(2), it would be a gross overstatement to argue that this notification requirement is a major thrust of the Act—indeed, North Star knows of no lawsuit involving the failure to provide government notification. More significantly, the legislative history of the NLRA indicates that concern about the impact that strikes and layoffs had on communities played *at least as significant a role* in the passage of that act as it did for WARN. *See Legislative History of the National Labor Relations Act, 1935*, NLRB Commemorative Publication, vol. II at 2915-16, 2962 (1985).

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[5] Even the government inadvertently calls attention to the close interrelationship between WARN and the NLRA. *See* Government Br. 20 ("By mandating 60 days' notice for all workers, Congress clearly intended to supplement existing rights under the NLRA."). The supplementation of existing statutory rights is strong evidence supporting the borrowing of the original statute's limitations period. *See Reed*, 488 U.S. at 319 (borrowing limitations period already established for other constitutional rights).

### 2. *The Pennsylvania Statutes Suggested By Respondents Are Not Analogous To WARN.*

Recognizing that the Court's current limitations test requires the affirmative consideration of "available state-law source[s]," *Lampf*, 501 U.S. at 357, Respondents attempt to compensate for the Third Circuit's failure to perform this essential analysis by suggesting their own "analogous" Pennsylvania statutes. Their efforts provide North Star with perhaps its strongest proof that there is no state statute analogous to WARN, and that the adoption of a uniform federal limitations period is necessary to avoid protracted "conflict, confusion, and uncertainty." *Wilson*, 471 U.S. at 266.

Respondents *themselves* cannot agree on which Pennsylvania statute is "most" analogous to WARN. In fact, Respondents have actually advocated different analogies in different courts. At the appellate level, the Thomas Respondents contended that "[t]he best choice, in our view, is the three years allowed by 43 Pa. Stat. Ann. § 260.9a(g) for bringing claims under the Pennsylvania Wage Payment and Collection Law. ('WPCL')." Thomas Appellate Br. 33. Now, before this Court, the Thomas Respondents take another approach, arguing that "the best choice among state limitations periods is the one chosen by a number of federal courts for WARN—state law statutes governing actions on contract." Thomas Br. 38-39 (citing two four-year Pennsylvania contract limitations periods, 42 Pa. Cons. Stat. Ann. §§ 5525(3) and (4)) (footnote omitted).

For its part, the government adopts the position taken by the Thomas Respondents in the court of appeals but abandoned by them in this Court. It prefers to apply the Pennsylvania WPCL. Government Br. 27. The Steelworkers, on the other hand, refuse to commit to either the WPCL or a state contract limitations period. They suggest either would be appropriate, and argue, alternatively, that "Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527, could be applied." Steelworkers Br. 13 n.8. The Thomas Re-

spondents also see a viable "alternative" in the Pennsylvania residual statute, and further suggest as a "final possible state analogy" Pennsylvania's two-year limitations period for enforcing civil penalties and forfeitures, 42 Pa. Cons. Stat. Ann. § 5524(5) (1994). Thomas Br. 40.

Respondents' failure to produce a coherent, uniform alternative to application of the NLRA is no doubt attributable to one uncontrovertible fact: like most states, Pennsylvania does not have a statute that is even remotely analogous to WARN. No Pennsylvania statute, and no principle of Pennsylvania common law, gives rise to an action based on notice of a plant closing or mass layoff. By contrast, of course, the NLRA, *does* recognize a cause of action for an employer's failure to give adequate displacement notification.

Pennsylvania's four-year contract period, suggested as the "best choice" by the Thomas Respondents, provides a particularly poor analogue to WARN. WARN provides for payment of damages in the event that employees are laid off without proper notice. Accordingly, a cause of action under WARN seeks to enforce a right created by statute. Pennsylvania contract law, on the other hand, does not protect any statutory rights, but rather applies to actions alleging breach of a private-party contract. Under WARN, however, a contractual relationship, is entirely immaterial—the Act applies independently of any contractual obligation and covers both at-will employees and workers with employment agreements. *See Halkias*, 31 F.3d at 235 ("no contractual right to continued employment is implicated by WARN").

The government's suggestion of an analogue between WARN and the Pennsylvania WPCL equally is erroneous. Previously, the Third Circuit specifically rejected application of the WPCL to the similar worker dislocation provisions of the Airline Deregulation Act on grounds that the WPCL is "premised on a contractual obligation that an employer has to pay wages and benefits, not a statutory right like the one here." *Haggerty v. USAir, Inc.*,

952 F.2d 781, 786 (CA3 1992) (footnote omitted). Indeed, the trial court in this case rejected the Thomas Respondents' earlier assertion of the WPCL for this very reason:

> The Wage Payment and Collection Law does not create an employee's right to compensation but only establishes a right to enforce the payment of wages and compensation to which an employee is otherwise entitled. The Worker Adjustment and Retraining Notification Act differs from the Pennsylvania Wage Payment and Collection Law in that the former creates a statutory right to monetary damages when an employer violates its provisions.

Pet. App. 19a (citations omitted). *See also Georgia-Pacific v. Unemployment Compensation Bd. of Review*, 157 Pa. Commw. 651, 667, 630 A.2d 948, 956-57 (1993) (under Pennsylvania law, WARN payments do not constitute "wages").

Respondents' "alternative" selections for state law borrowing—Pennsylvania's six-year "residual" statute of limitations and the state's "civil penalties and forfeiture act" —are even less analogous to WARN. In *Agency Holding*, 483 U.S. at 152-53 (citing *Wilson*, 471 U.S. at 278), the Court specifically rejected application of Pennsylvania's residual limitations period to RICO on the grounds that Congress would not have intended the application of a "catch-all" *state* residual limitations period to a federal enactment. Likewise, Respondents have failed to cite to a single case supporting application of a "civil penalty or forfeiture" provision to WARN. This is not surprising, given that the relief Respondents would be entitled to under WARN—back wages for sixty days—is not a civil penalty or forfeiture.

The above discussion confirms the Sixth Circuit's conclusion about analogizing WARN to state law: "[t]he only commonality between WARN and the proferred state statute [of limitation] is that both are pieces of legislation." *United Mine Workers v. Peabody Coal Co.*,

38 F.3d 850, 856 (CA6 1994), *petition for cert. filed*, 63 U.S.L.W. 3644 (Feb. 16, 1995). It underscores this Court's previous observations that "[s]tate legislatures do not devise their limitations periods with national interests in mind," *Occidental*, 432 U.S. at 367, and that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." *DelCostello*, 462 U.S. at 161. As the conflicting views of the Respondents demonstrate, only the selection of the NLRA as a uniform, national limitations period for WARN can end the pointless struggle to find some trace of analogy to WARN in the interstices of state law. Given the clear analogy between WARN and the NLRA, such a struggle with state analogy is not only unnecessary, but also unwise.[6]

### C. Respondents Fail to Refute North Star's Argument That Both Federal Policies And The Practicalities Of Litigation Support The Borrowing Of Federal Law.

In addition to requiring a "closer analogy," the Court's existing doctrine requires North Star to show that "the federal policies at stake and the practicalities of litigation" favor federal borrowing. In its initial brief, North Star pointed to several such policies and practicalities: *i.e.*, the need for uniformity, the danger of forum shop-

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[6] Alternatively, Respondents suggest that, if state law is not sufficiently analogous, the Court should borrow the two-year limitations period contained in the federal Portal-to-Portal Act, 29 U.S.C. § 255, instead of the NLRA. Thomas Br. 42-43; Steelworkers Br. 27-29. That the NLRA is clearly more analogous than the Portal-to-Portal Act can be seen by the close interplay between WARN and the NLRA—detailed in North Star's initial brief—and by the fact that the Portal-to-Portal Act concerns only employee entitlements to wages earned for work actually performed. WARN, on the other hand, by its very nature provides an entitlement regardless of any work performed by the employee. Thus, the Portal-to-Portal Act is similar to Pennsylvania's Wage Payment and Collection Law, and the arguments made to address that contention are equally applicable here. Not surprisingly, this alternative federal analogy has not garnered any judicial or academic support.

ping, and the appropriateness of a short limitations period for WARN. Respondents challenge these contentions, but their responses cannot overcome the clear practical and policy concerns favoring federal borrowing.

Respondents' arguments as to uniformity and forum shopping are perhaps the feeblest. Respondents make no effort to refute North Star's contention that, even if a single kind of analogous state limitations period could be found and then uniformly applied to WARN, the wide divergence in *length* of such limitations periods would—given WARN's broad venue provision—provide ample opportunity for forum shopping (and lead to the inequitable application of federal rights). North Star Br. 14-18.[7] Respondents' rejoinder to this problem can be summed up in two words: "too bad." Indeed—and remarkably—the government goes so far as to argue against application of even a uniform *state* limitations period—a result completely contrary to this Court's post-*DelCostello* teachings and one that would foretell years of wasteful WARN "characterization" litigation. Government Br. 27-28 n.19.

Rather than denying the availability of forum shopping, Respondents try to downplay its significance by suggesting that Petitioners' concerns are "overstated," and that, given the broad venue provisions of other federal statutes, forum shopping under the WARN Act is "no more problematic than under other federal statutes in which state statutes of limitations are borrowed."[8] *See*

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[7] A complete discussion of the need to apply the NLRA limitations period so as to avoid WARN forum shopping is presented in Peter J. Mignone, *What Statute Of Limitations Should Apply To The Worker Adjustment And Retraining Notification Act?*, 63 Fordham L. Review 1418 (1995).

[8] The consolidated case, No. 94-835, demonstrates that North Star's forum shopping concerns are not "overstated." Instead of bringing suit in Georgia, the Steelworkers travelled to Pennsylvania—a decision which not only provided them with a favorable limitations ruling, but may also increase their potential recovery

Steelworkers Br. 18-20; Thomas Br. 10; Government Br. 25-26.[9] Respondents' argument that WARN forum shopping problems are "not any worse" is hardly a compelling justification for applying state law; in any event, the argument is also factually incorrect. What makes the prospect of forum shopping particularly troublesome under WARN is the difficulty in characterizing WARN claims under any *particular* state cause of action, the divergent length of limitations periods available for even the same kind of potentially-applicable state statutes, and the multistate nature of many WARN transactions.[10] It

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of damages through application of the Third Circuit's expansive interpretation of WARN damages. *Compare United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (CA3 1993) (damages of 60 *calendar days* available), *cert. denied*, 114 S. Ct. 1060 (1994) *with Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275 (CA5 1994), *cert. denied*, 115 S. Ct. 933 (1995) (damages limited to *work days within* 60 calendar days).

[9] The government's advocacy of this position is incredible given that, in its recent amicus curiae brief in *Carpenters District Council*, it took *exactly the opposite position*. Arguing against the Fifth Circuit's limitation of WARN damages to work days *within* 60 calendar days (instead of 60 calendar days), the government stated: "However this conflict is resolved, the WARN Act should be uniformly interpreted and applied. . . . [C]oupled with the Act's liberal venue provision, which permits a suit in 'any district in which the violation is alleged to have occurred, or in which the employer transacts business,' 29 U.S.C. 2104(a)(5), the current conflict is an invitation to widespread forum shopping." *Id.* at 16. The government illustrated its point by providing the troubling example of a Louisiana employee bringing a WARN action in Pennsylvania, where "the employer happens to transact business," to take advantage of more favorable WARN precedent. *Id.* at 16 n.13. Without explanation, the government has now abandoned these concerns. It appears that the government's position on WARN is motivated more by political expediency than by dedication to the effective and appropriate administration of the Act. *See* Frank Swoboda, *Clinton Woos Traditional Party Allies; President Courts Labor In Drawing The Lines*, The Washington Post, February 22, 1995, at A1.

[10] In *Peabody Coal*, for example, the United Mine Workers, unlike the Thomas Respondents, did not argue that its WARN claim should be governed by the state contracts limitations period—no

is these specific dangers unique to WARN that require the reliance on a uniform federal limitations period.[11]

As a final argument against federal borrowing, Respondents contend that the six-month limitations period contained in the NLRA is simply too short a period of time in which to require WARN plaintiffs to bring suit, and that the federal interest in speedy resolution of employment disputes is not applicable to WARN. Neither contention is meritorious.

As noted in North Star's initial brief, many WARN actions brought to date have been filed within six months of their accrual—clearly suggesting that application of the NLRA limitations period will not present an undue burden to future litigants. North Star Br. 29. Nonetheless, Respondents claim that the existence of certain "relatively complex issues" makes it inequitable to require potential plaintiffs to file WARN suits within six months. Chief among Respondents' concerns is the scenario in which a layoff is initially announced as temporary, but later triggers WARN notification requirements when it lasts beyond six months. Thomas Br. 37; Steelworkers Br. 29 n.23. (*See* 29 U.S.C. § 2102(c), layoffs lasting less than six months do not trigger WARN notification requirements). According to the Thomas Respondents, "if the employer does not announce at the outset that the layoff or closing is permanent, prospective plaintiffs must make the [difficult] judgment whether the layoff is likely to last more than six months." Thomas Br. 37.

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doubt because the Kentucky period applicable there would have led to a 15-year limitations period. *See* Ky. Rev. Stat. Ann. § 413.090(2). As this example illustrates, even uniform "characterization" of a limitations period will result in wildly divergent and inappropriate applications for WARN.

[11] Forum shopping would not have troubled the Court in *Wilson* or *Owens* because, given the necessity for "state action," § 1983 claims must generally be brought where the public entity is located—thus forum shopping is not possible. *See Davis v. Louisiana State Univ.*, 876 F.2d 412, 413 (CA5 1989).

Respondents' position on this point is erroneous—and, demonstrates that the "equities" here do not favor their position. For despite Respondents' assumption to the contrary, WARN is clear that, in circumstances where an employer announces a layoff as being only temporary, the claim does not accrue and the limitations period would not begin running until six months have passed and the employees have not returned to work. 29 U.S.C. § 2102(c); 54 Fed. Reg. 16041, 16049 (WARN Final Rule, 1989); *Halkias*, 825 F. Supp. at 126, *aff'd*, *supra*; *Automobile Mechanics Local 701 v. Santa Fe Terminal Servs., Inc.*, 830 F. Supp. 432, 434-35 (N.D. Ill. 1993).

Accordingly, the reality in the instant case—and indeed, the reality in many of the most difficult WARN lawsuits—is that the Thomas Respondents actually had *one year from the date of their layoff to timely commence their action.* Indeed, the Steelworkers, who previously brought a successful suit against North Star stemming from the same layoff, managed to file their claim within *two weeks* of the date that the six-month layoff was triggered.[12] North Star Br. 3. Despite that suit, the Thomas Respondents waited an additional 13 months—more than 20 months after their layoff—to bring this suit. Under these circumstances, Respondents' suggestion that they were not reasonably able to timely file their action under an applicable NLRA limitations period is without merit.

Finally, Respondents contend that there is nothing in WARN to suggest that "speedy resolution" of WARN claims was a legislative priority. Indeed, they argue that the traditional federal policy favoring quick resolution of

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[12] Respondents' insinuation that some sort of adverse inference should be drawn from North Star's "failure" to assert a statute of limitations defense in the earlier Steelworkers action (Thomas Br. 2; Government Br. 4 n.1) is erroneous. The Steelworkers' claim was timely under a Section 10(b) limitations period following accrual.

labor and employment disputes is not applicable to WARN, but rather only to claims stemming from collective bargaining, actions by "non-discharged" employees, and actions that may be brought in administrative fora. Steelworkers Br. 14; Thomas Br. 33-35; Government Br. 8, 16. None of these statements are correct.

As explained in North Star's initial brief, the legislative history of WARN, as well as subsequent administrative and judicial interpretations, fully supports North Star's contention that WARN was designed to afford *prompt* remedial relief to dislocated workers—not damages to such individuals years after the fact.[13] North Star Br. 28-32. One commentator recently summarized this congressional intent as follows:

> The argument that WARN requires a longer statute of limitations also neglects to consider Congress' purpose in passing WARN. By enacting WARN, Congress intended to provide short-term assistance to employees, their communities, and local governments to accelerate retraining, relocation, and reemployment. To achieve this purpose, it is important that workers claim and receive this relief promptly after discharge. A limitation period permitting a worker to recover on a WARN claim several years after the violation obviously fails to further this objective.

Mignone, 63 Fordham L. Review at 1457.

Respondents also are wrong to suggest that federal policy favoring "speedy resolution" is limited to administrative matters stemming from the collective bargaining disputes of "non-discharged" employees. Many federal employment suits having nothing to do with collective bargaining have extremely short limitations periods. Title

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[13] The Steelworkers even acknowledge the short-term purpose behind WARN, conceding that WARN was intended to "soften the blow" of employment loss, and "enable affected employees to arrange their finances and begin their search for other employment." Steelworkers Br. 25.

VII, for example, requires employees to hire a lawyer and bring suit within *ninety days* of the termination of EEOC proceedings—proceedings that must be initiated by the employee within either 180 or 300 days of the triggering event. 42 U.S.C. §§ 2000e-5(e), (f). Moreover, the majority of employment discrimination suits, including those filed under the Age Discrimination in Employment Act ("ADEA"), are brought by terminated workers who have no "continuing relationship" with their employers.[14] Accordingly, the federal interest in speedy resolution of employment disputes is not limited to collective bargaining, and is fully applicable to WARN.

## II. THE CONTINUED RETENTION OF THE COURT'S FLAWED LIMITATIONS BORROWING DOCTRINE IS NOT JUSTIFIED.

Respondents also take issue with North Star's call for reform of the Court's limitations borrowing doctrine. The most thoughtful response on this point, from the Thomas Respondents, concedes that there would be advantages to a presumption favoring federal borrowing—most notably uniformity—but suggests that Congress has not sufficiently signalled its desire for such a change and, besides, altering the presumption now might breed more litigation than it would resolve. Thomas Br. 43-46. Neither criticism, however, can withstand serious scrutiny.

First, it must be recognized that the primary justification for the Court's existing doctrine—that Congress "intends by its silence that we borrow state law," *Agency Holding*, 438 U.S. at 147—is premised on only the most tenuous of legislative fictions. Commentator Kaulbach provides a particularly well-reasoned argument against this presumption:

> [T]here are good reasons to refrain from interpreting congressional silence as endorsement. Congressional

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[14] Many WARN notification situations *do* involve continuing relationships—most notably where the obligations are owed to unions, and to employees suffering a "mass layoff."

> inaction can be attributed to many factors. For example, it is generally acknowledged that it is much easier to kill a bill than to pass one. Congress may find the matter too trivial to deserve attention, or may ignore it simply out of inertia. Congress may, in fact, have no strong preference on the issue and thus will acquiesce to any judicial rule. Alternatively, members of Congress may disagree with the judicial rule but find themselves unable to agree on a particular alternative. Moreover, the silent acquiescence of a subsequent Congress in the interpretation of a statute is not probative of the original, enacting Congress' intent.
>
> These general observations are particularly apt in the context of limitations periods. Limitations periods are hardly glamorous legislative issues, and are likely to seem in less urgent need of legislative attention than many other problems. Since it is a fairly technical legal problem, Congress may well be content to delegate the responsibility for setting the rules to the judiciary.

Kaulbach, 77 Cal. L. Rev. at 155-56 (footnotes omitted).[15]

Given the flimsiness of the "silence" presumption, it is erroneous to argue, as Respondents do, that the sponsors of the 1990 "fallback" statute of limitations, 28 U.S.C. § 1658 (which prospectively imposes a federal limitations period on *future* federal statutes that do not themselves

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[15] Another commentator has observed that "after 1983, the year of the *DelCostello* opinion, arguments that congressional silence implies Congress' approval of borrowing from state law begin to lose weight. And as additional Supreme Court cases borrowing from federal rather than state sources appear, see, for example, *Agency Holding*, 483 U.S. 143 (1987), the implications of Congressional silence become [even more] unclear." Andrew R. McCarroll, *Borrowing A Limitations Period For The Worker Adjustment And Retraining Notification Act: An Occasion For The Supreme Court To Rethink Its Preference For State Law*, at 9 n.39 (Feb. 24, 1995) (on file with the Vanderbilt Law Review). Here, WARN was enacted by Congress in 1988, several years after the automatic presumption of state limitations borrowing ended.

specify a time limitation), did not sufficiently signal Congress' displeasure with the Court's existing state law borrowing presumption. To the contrary, the sponsors stated their displeasure firmly and directly:

> At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, [appears] to lack persuasive support as a matter of policy.

136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Biden).

Despite this clear congressional rebuke, Respondents contend that another "negative inference" should be gleaned from Congress' failure to include in the "fallback" bill any limitations period for pre-existing federal statutes, such as WARN, that then lacked such periods. While this inference is dubious for the reasons stated above, it is also contrary to the legislative history. That history indicates that the reason why Congress did not set limitations periods for pre-existing statutes in 1990 was that—in addition to lacking the political will to undertake such excruciating analysis—it did not wish to, without further analysis, upset the "settled expectations" of potential litigants. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870. In this regard, Congress was expressing its concern for altering the limitations periods of statutes, such as 42 U.S.C. § 1983, for which limitations periods *had already been borrowed*—and not for recently-enacted statutes, such as WARN, that had no such "settled expectations." *Id.* Accordingly, Respondents are wrong to suggest that the "fallback" statute demonstrates anything other than congressional intent favoring the adoption of uniform federal limitations periods for all federal statutes where the limitations periods are unsettled.

Additionally, the above analysis rebuts Respondents' other principal contention—that a shift to a presumption

favoring federal borrowing would require this Court to revisit the limitations periods for statutes for which the issue already has been settled. This was not Congress' intent in passing the fallback statute, and no recognized jurisprudential principle would require it. Rather, the following approach could be taken: "[a]s individual cases arise where there are no settled expectations about the proper limitations period," the courts should "address Congress' clear concern for uniformity, predictability, and judicial economy by adopting a federal limitations period." McCarroll, at 34.[16]

Given these practicalities, the time has come for this Court to end the "conflict, confusion, and uncertainty" caused—and demonstrated in this litigation—by the Court's existing practice of borrowing state limitations periods for federal laws. It should replace this flawed doctrine with a presumption favoring the uniform borrowing of federal law. As commentators have noted, this change is overdue:

> The Court should consider adopting uniform national limitations rules to govern all federal claims—implied and express—for which Congress has failed to enact a limitations rule. The Court has earlier declared that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Those attributes distinguishing federal claims "fundamentally" from state laws, such as concepts unknown to the common law and interstate transactions, characterize many federal claims. The policies advanced by adopting uniform limitations periods—certainty, pre-

[16] McCarroll notes that one method of accomplishing such borrowing would be to keep the tests articulated in *DelCostello* and *Lampf*, with one modification: "The preference should shift from borrowing state to borrowing federal law. Thus, under *DelCostello*, if a rule from federal law provides a close analogy, and federal policies and the practicalities of litigation are not frustrated by choosing the federal limitations period, then federal law should be borrowed. Only when federal law offers no analogy should the courts look to state law." *Id.* at 34-35 (footnote omitted).

> dictability, and minimization of litigation—would be promoted by uniform periods for all federal statutes. In an age of multistate activity largely regulated by federal rather than state law, the state borrowing rules may also be an anachronism.

105 Harv. L. Rev. at 409 (footnotes omitted). *See also* Kaulbach, 77 Cal. L. Rev. at 136 (arguing that Court should abandon its presumption favoring state law borrowing).

Applying these principles here, it is clear that the NLRA's six-month statute of limitations period should be borrowed for WARN. Given the obvious lack of analogy between WARN and the various suggested state causes of action, the clear resemblance in purpose and structure between WARN and the NLRA, and the manifest federal need for uniformity in the application of this federal statute, the Section 10(b) limitations period should now be adopted for WARN.

## CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded with instructions to reinstate the district court's judgment in favor of North Star.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1994

NORTH STAR STEEL COMPANY,

*Petitioner,*

v.

CHARLES A. THOMAS, *et al.*,

*Respondents.*

CROWN CORK & SEAL CO., INC.

*Petitioner,*

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

## BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

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## QUESTION PRESENTED

Whether, in actions brought under the federal Worker Adjustment and Retraining Notification Act ("WARN"), the applicable limitations period should be drawn from § 10(b) of the National Labor Relations Act ("NLRA") rather than state law.

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## BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. The Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[2]

The National Association of Manufacturers of the United States of America ("the NAM") is a voluntary business association of over 13,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The NAM and these councils

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with the Clerk of the Court.

[2] *See, e.g., McKennon v. Nashville Banner,* ___ U.S. ___, 63 U.S.L.W. 4104 (1995); *ABF Freight Systems, Inc. v. NLRB,* ___ U.S. ___, 114 S. Ct. 835 (1994); *Gilmer v. Interstate/Johnson Lane Corp.,* 111 S. Ct. 1647 (1991).

provide information and other educational services and publications to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them. Like the Chamber, the NAM actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts.[3]

These consolidated cases address the question of whether the statute of limitations for violations of the Worker Adjustment and Retraining Notification Act ("WARN") should be borrowed from state law or from § 10(b) of the National Labor Relations Act (the "Act" or the "NLRA"). This issue is of particular concern to Chamber and NAM members who are subject to WARN's procedures during a plant closing or layoff. On behalf of its members, the Chamber filed *amicus curiae* briefs before the U.S. Court of Appeals for the Third Circuit in these cases. Additionally, the Chamber filed briefs before the U.S. Court of Appeals for the Fifth and Sixth Circuits in cases addressing precisely this same issue. *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204, 1994 WL 520351 (5th Cir., Sept. 22, 1994); *United Mine Workers of America v. Peabody Coal Company*, ___ F.3d ___, 1994 WL 590188 (6th Cir. 1994).

Both the Chamber and the NAM believe that the federal policies at stake in the WARN Act – and the practical problems state limitations periods would create

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[3] *See, e.g., St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); *R.R. Donnelley & Sons Co. v. Prevost*, 111 S. Ct. 1415 (1991).

for WARN litigants – make the NLRA limitations period profoundly more appropriate for actions brought under WARN. On behalf of the large number of their members who are subject to the notice requirement of the WARN Act, the Chamber and the NAM urge this Court to apply the six-month statute of limitations from § 10(b) of the NLRA to WARN actions.

## STATEMENT OF THE CASE

The U.S. Court of Appeals for the Third Circuit rejected application of the six-month statute of limitations from § 10(b) of the NLRA in these two consolidated cases. In *North Star Steel Co. v. Thomas,* the appellate court reversed the U.S. District Court for the Middle District of Pennsylvania for dismissing as time-barred a complaint alleging failure to give notice of a plant closing which was filed nearly 20 months after the plant closed. In *Crown Cork & Seal Co. v. United Steelworkers of America,* the appellate court affirmed the U.S. District Court for the Eastern District of Pennsylvania's denial of the company's motion for summary judgment, which argued that an action brought more than twelve months after a plant closing was time-barred.

In reaching this decision, the appellate court acknowledged that "none of the possible state laws provide perfect analogies to WARN," and "that there are some definitional overlaps" between the two federal statutes. Nevertheless, the court held that the policies underlying WARN, and the practicalities of WARN litigation

did not merit an exception to the general rule dictating state borrowing. The Third Circuit, however, declined to specify which of the four Pennsylvania limitations periods should be applied to the instant cases. On January 6, 1995, this Court granted both companies' petitions for writ of *certiorari*.

## ARGUMENT

These cases concern a fundamental aspect of federal statutory interpretation: whether the statute of limitations period from § 10(b) of the National Labor Relations Act should be "borrowed" for actions arising under the Worker Adjustment and Retraining Notification Act. The federal courts of appeals have divided on this issue.[4] The Chamber and the NAM urge this court to reaffirm the standard it set forth in *DelCostello v. International Brotherhood of Teamsters, et. al.*, 462 U.S. 151 (1983), which

[4] As noted in the petitions for writ of *certiorari*, the Fifth and Sixth Circuits have applied the six-month limitations period from § 10(b) of the NLRA to actions brought under WARN. *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos 93-1664, 93-1680, 93-8204, WL 520351 (5th Cir. Sept. 22, 1994); *United Mine Workers of America v. Peabody Coal Company*, 38 F.3d 850 (6th Cir. 1994). On the other hand, the Second and Third Circuits have applied state limitations periods to WARN actions. *United Paperworkers International Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993); *United Steelworkers of America v. Crown Cork & Seal*, 32 F.3d 53 (3d Cir. 1994), *cert. granted*, 63 U.S.L.W. 3514 (U.S. Jan. 6, 1995).

supports application of a federal limitations period when the federal period provides a "closer analogy" than the state limitations period *and* the practicalities of litigation make the federal rule significantly more appropriate than the state limitations period.

Application of the *DelCostello* framework to the instant case supports adoption of the NLRA limitations period for actions brought under WARN. Since both statutes address essential facets of federal labor law, WARN's policies are best effectuated by application of § 10(b)'s six-month limitations period. Furthermore, the practicalities of WARN litigation, in terms of preventing forum shopping and facilitating the efficient resolution of WARN actions, makes the six-month period vastly more appropriate than a state limitations period.

## I. THIS COURT'S RULING IN *DELCOSTELLO v. TEAMSTERS* SUPPORTS APPLICATION OF THE FEDERAL LIMITATIONS PERIOD.

### A. The Six-Month Statute of Limitations Period From § 10(b) of the NLRA Provides a "Closer Fit" Than the State Limitations Period.

When Congress fails to provide a statute of limitations for a federal cause of action, courts generally "borrow" or "absorb" the limitation period for the most analogous state cause of action. *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. ___, 115 L. Ed. 2d 321 (1991). This Court, however, has recognized a significant exception to the rule directing "state borrowing." In

*DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 172 (1983), the Court held that

> when a rule from elsewhere in federal law clearly provides a **closer analogy** than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, **we have not hesitated to turn away from state law.**

(*emphasis added*). *See also Lampf*, 115 L. Ed. 2d at 331-32 (quoting *DelCostello*).

In *DelCostello*, the Court ruled that an employee's action against an employer for breach of a collective bargaining agreement and against the union for breach of the duty of fair representation was governed by § 10(b)'s six-month limitations period. According to the Court, this type of "hybrid" action was more similar to an action for an unfair labor practice than a breach of contract claim. In reaching this conclusion, the Court made three determinations: (1) that the NLRA provided a closer analogy to the federal claim than the state limitations period; (2) that the federal policies at stake favored application of a uniform, federal statute of limitations; and (3) that the practicalities of litigation favored the application of a uniform federal limitations period. *DelCostello* at 171-72.

Federal limitations periods have been borrowed by this Court using the *DelCostello* framework in a number of circumstances. In *Agency Holding Corporation v. Malley-Duff & Associates*, 483 U.S. 143 (1987), the limitations period from the Clayton Act for civil enforcement actions was borrowed for actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Based on the standard set out in *DelCostello*, the Court determined that the Clayton Act – rather than a state cause of action – offered the closest analogy to civil RICO actions.[5] 483 U.S. at 150. Similarly, in *West v. Conrail*, 481 U.S. 35 (1987), the Court applied the limitations period from § 10(b) of the NLRA to actions brought under the Railway Labor Act.

Actions brought under WARN also fall within the category of actions better governed by a federal limitations period. As explained below, the NLRA provides a closer analogy to WARN than do the state-law causes of action urged by the Respondents. Moreover, significant practical difficulties will result for both employers and employees unless the § 10(b) limitations period is adopted.

**1. Important Substantive Reasons Exist for Applying the NLRA's Statute of Limitations Period to WARN Cases.**

The Chamber and the NAM contend that the six-month statute of limitations from § 10(b) of the NLRA must govern causes of action brought under WARN because both statutes govern fundamental aspects of federal labor policy. As stated in *DelCostello*, courts should not borrow the limitations period applicable to state-law claims when the federal-law cause of action provides a

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[5] The Court in *Agency Holding* added an initial inquiry to the *DelCostello* framework, which asks whether a uniform statute of limitations should be established for the federal cause of action "to avoid intolerable 'uncertainty and time-consuming litigation.' " *Agency Holding* at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)).

closer analogy to the cause of action at issue.[6] 462 U.S. at 172. Here, WARN and the NLRA have meaningful substantive similarities that support application of the federal limitations period to WARN actions.[7]

WARN can clearly be analogized to the NLRA. *See e.g., United Mine Workers of America v. Peabody Coal Co.*, 38 F.3d 850, 856 (6th Cir. 1994) ("there can be no doubt that Section 10(b) provides a closer analogy than the state law advocated here, which in essence provides no analogy"). Congress was cognizant that WARN regulated aspects of federal labor policy, and that it would have a dramatic effect on the NLRA.[8] The sponsors of WARN went to

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[6] According to this Court's teachings in *DelCostello*, all that is needed is a "close fit" – not a "perfect fit" – in order to justify favoring a federal limitations period over a state law limitations period.

[7] The Chamber and the NAM contend that the Third Circuit erred in finding that the NLRA is only concerned with the "process" of collective bargaining. The court's distinction between "process" and "substance" ignores the fact that one of the purposes central to the NLRA is the protection of concerted activity by *all* employees, regardless of whether they are represented by a union. 29 U.S.C. § 157. *See also* 1 *Developing Labor Law* 137 (P. Hardin *et al.* eds, 3d ed. 1992) (NLRA "broadly protects 'concerted' activity, not merely union activity").

[8] Congress often recognizes that a new law regulating an aspect of the employer-employee relationship will have an impact on the NLRA. In these situations, Congress either makes a general reference to the NLRA *or* – as in the case of WARN – specifically incorporates definitions from the NLRA itself. *See* Labor Management Reporting and Disclosure Act, 29 U.S.C. § 402(j)(1) (defining a labor organization as "the certified representative of employees under the provisions of the National Labor Relations Act"); Age Discrimination in Employment Act, 29 U.S.C. § 630(e)(1) (adopting the definition

special efforts to guarantee that these two federal labor statutes were compatible. For example, Senator Hatch, ranking minority member of the Senate labor committee, stated that WARN "constitutes a major change in the National Labor Relations Act." 134 Cong. Rec. 15923, 15924 (June 24, 1988). With this concern in mind, Congress specifically incorporated the NLRA into WARN by adding the following provision:

> The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter, shall not constitute a violation of the National Labor Relations Act . . .

29 U.S.C. § 2108.

Moreover, WARN regulations issued by the Department of Labor (20 C.F.R. part 639) expressly incorporate or reference provisions of the NLRA. *See* § 639.1(g) ("Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN. . . . "); § 639.3(d) (incorporating the NLRA's definition of "exclusive representative"); § 639.6 (requiring notice be given to exclusive representatives); and § 639.7 (detailing the information that must be provided to the employees' exclusive representative). In addition to the incorporation of these specific terms, the Department has explicitly suggested that courts interpret WARN in accordance with NLRA precedent.[9] 54 Fed. Reg. 106041-42 (April 20, 1989).

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of labor organization from the NLRA); and Civil Rights Act of 1964, 42 U.S.C. § 2000e(e)(1) (incorporating the definition of labor organization from the NLRA).

[9] *See e.g. Carpenters District Council of New Orleans & Vicinity v. Dillard Department Stores, Inc.* 15 F.3d 1275, 1283 (5th

Furthermore, WARN and the NLRA are the only two federal statutes that provide protections to employees who are the subject of mass layoffs or plant closings. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (setting forth a standard for determining when negotiation over the effects of a plant closing or layoff is a mandatory subject of bargaining under the NLRA); *Dubuque Packing Co., Inc.*, 303 N.L.R.B. No. 66 (1991), *review granted in part, enforcement granted in part, remanded*, 1 F.3d 24 (D.C. Cir. 1993), *cert. dismissed*, 114 S. Ct. 2157 (1994) (affirming the NLRB's new standard for determining when an employer must bargain with a union over the effects of a plant closing or layoff). As the Fifth Circuit aptly observed, "[t]he NLRA is more than just analogous to WARN; in fact, WARN may be thought of as an outgrowth of the NLRA, because § 8(a)(1) and 8(a)(5) of the NLRA . . . have [both] been interpreted to require an employer to notify a union of its decision to close a plant." *Halkias v. General Dynamics Corp.*, 31 F.3d 224 (5th Cir. 1994), *en banc rehearing granted*, Nos. 93-1664, 93-1680, 93-8204 WL 520351 (5th Cir., Sept. 22, 1994) at 232.

By contrast, WARN has no relationship to the state common law limitations periods. In the instant case, the

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Cir. 1994), *cert.* denied, 63 U.S.L.W. 3559, 3562 (Jan 23, 1995) (citing National Labor Relations Board principles regarding back pay); *Damron v. Rob Fork Mining Corp.*, 945 F.2d 121, 124 (6th Cir. 1991) (analyzing WARN's "reasonable expectation of recall" language according to NLRB guidelines); and *Bradley v. Sequoyah Fuels Corp.*, 847 F.Supp 863, 868 (E.D. Okla. 1994) (applying NLRB guidelines regarding "temporary layoff" and "reasonable expectation of recall" to WARN actions).

Third Circuit sanctioned the use of four alternative Pennsylvania limitations periods, each of which bears no relation to federal labor relations or plant closings. Clearly, the Third Circuit was incorrect in holding that state law provides a closer substantive similarity to WARN.

### 2. Important Practical Reasons Exist for Applying the § 10(b) Limitations Period to WARN Actions.

The six-month period contained in § 10(b) of the NLRA must be "borrowed" for actions brought under the WARN to avoid creating practical problems for WARN litigants. The purpose of WARN is to provide uniform federal regulation of plant closings and mass layoffs. Unless a uniform federal statute of limitations is applied in WARN actions, this purpose will be completely undermined.

Application of state limitations periods to WARN actions will significantly increase forum shopping by potential plaintiffs, and will serve to complicate all aspects of WARN litigation. WARN contains a broad venue provision allowing suit in, among other places, any district in which the employer **transacts business**. 29 U.S.C. § 2904(a)(5). The practical consequence of combining this expansive venue provision with widely divergent state statutes of limitation **would be to drive WARN suits into jurisdictions having little or no rational connection to the parties or to the WARN events**. Jurisdictions – in which the only connection between the court and the suit is that the employer transacted business in that venue – would become vehicles for litigating claims

time-barred by the state in which the WARN events occurred and the parties reside.

The effort to cure a default in one state by shopping for a longer statute of limitations in another would breed expensive and complex battles over choice of law questions. *See Peabody Coal,* 38 F.3d at 855 (describing the choice of law problems as "potentially daunting"). A court district sitting in a jurisdiction other than where the WARN claim arose first would have to determine whether or not it should adopt the forum state's choice of law principles as surrogate for federal common law. *See Halkias,* 31 F.3d at 236-37 (noting that choice of law principles in federal question cases are derived from federal common law). Once the court decides to do so, it must then determine whether the forum state views statutes of limitations as substantive or procedural. *See id.* If the forum views limitations periods as procedural, only then would the court proceed to determine the merits of the WARN issue, using the forum state's limitations period. All these determinations would likely cause time-consuming litigation, thereby wasting substantial amounts of judicial resources and running up unnecessary attorney's fees for all parties.

The delay and costs inherent in permitting parties to file suit in states that have no relationship to the dispute other than a longer limitations period would be particularly destructive to WARN. Circumstances in which plants are closed and workers are laid off in mass are not reasonably addressed in litigation years after the fact. Small businesses, in particular, would be severely impacted by delay in litigating WARN suits. As a practical matter, small businesses do not have the resources to

maintain personnel records for any length of time. Key witnesses are likely to be unavailable at the time a WARN action ensues. In fact, WARN typically applies to a small business only during its closing. It is unreasonable to assume that a WARN claim in that context – one asserted against a business that no longer exists after its plant is closed – can be maintained years after the fact.

Additionally, allowing parties to "forum shop" will have a detrimental impact on the judiciary. As in the instant case, plaintiffs in WARN actions will advocate adoption of the most advantageous state limitations period, and the courts will be forced to litigate the limitations dispute before reaching the merits of the WARN dispute. This not only wastes critical judicial resources, but also delays compensation to plaintiffs for what may later be judged to be a meritorious WARN claim. Katherine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations By Default*, 72 Neb. L. Rev. 454, 473 (1993).[10]

Borrowing state limitations periods will only further complicate complex multi-state litigation. The DOL's regulations expressly recognize that WARN claims may involve multiple sites under common ownership or control.[11] For a Chamber or NAM member, a "downsizing"

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[10] This case illustrates the problem lack of uniformity creates. Both North Star Steel Company and Crown Cork & Seal initiated their plant closings in 1991. Approximately four years later, the merits of these claims have not been reached because of litigation over the limitations issue.

[11] The regulations point to the case of a "major automaker which has dozens of automobile plants throughout the country." 20 C.F.R. § 639.3(a)(4).

may involve closing individual divisions located in several states. In such cases involving multiple claims, "[t]rying to determine what state time-bars apply further complicates an already complex action and may impair settlement negotiations." *Id.* at 474. Adoption of the NLRA's uniform limitations period would alleviate these concerns.

Since WARN emphasizes the speedy resolution of disputes, the six-month limitations period from § 10(b) is by far more appropriate than any state limitations period of greater length. The assumption that WARN's enforcement will be fostered by lengthy state limitations periods is simply misconceived. The purpose of WARN is to provide advance notice of imminent unemployment so that employees can pursue other employment options. To further this purpose, Congress limited the remedies for a WARN violation to the sixty days' pay the employee would have received had the proper notice been given. The variety of compensatory and punitive remedies that prompt individuals to sue years after a plant closes are just not available in WARN actions. Thus, the six-month limitations period is consistent with Congress' intent to provide quick resolution of WARN disputes.[12]

Finally, the six-month limitations period from § 10(b) provides an effective balance between an employee's need to commence legal actions and an employer's need

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[12] Consistent with this emphasis on efficient resolution of WARN disputes, Congress does not impose civil sanctions on employers who make complete payments within three weeks of the WARN event to employees affected by a plant closing or layoff. 29 U.S.C. § 2104(a)(4).

to know its contingent liabilities in planning for the future. The relatively short limitations period has worked effectively under the NLRA for approximately forty years. In addition, short limitations periods have been adopted by Congress in a number of other federal labor statutes. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) ("A charge under this section shall be filed within 180 days after the alleged unlawful employment practice . . . "); and Civil Service Reform Act of 1978, 5 U.S.C. § 7118(a)(4)(A) (" . . . no complaint shall be issued based on any alleged unfair labor practice which occurred more that 6 months before . . . "). Thus, application of the six-month period from § 10(b) would be consistent with Congress' past actions in the employment area.

## CONCLUSION

For the foregoing reasons, the Chamber and the NAM urge the Court to apply the six-month statute of limitations from § 10(b) of the NLRA to actions brought under WARN.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY, PETITIONER

*v.*

CHARLES A. THOMAS, ET AL.

CROWN CORK & SEAL CO., INC., PETITIONER

*v.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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## QUESTION PRESENTED

Whether civil actions brought under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.*, which contains no statute of limitations, are subject to the most analogous state statute of limitations or to the six-month limitations period for filing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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## INTEREST OF THE UNITED STATES

The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101 *et seq.*, requires covered

employers to give employees or their representatives 60 days' notice of a plant closing or mass layoff. These cases present the question of the appropriate statute of limitations in a civil action brought under the Act. The WARN Act grants the Secretary of Labor authority to "prescribe such regulations as may be necessary to carry out" the Act. 29 U.S.C. 2107(a). The Secretary has promulgated regulations that "establish basic definitions and rules for giving notice" under the Act, 20 C.F.R. 639.1(b), which are part of a coordinated effort to assist dislocated workers. 20 C.F.R. 639.1(f); see 20 C.F.R. Pt. 639. Those regulations implement the purposes and policies of the WARN Act, which are implicated in the determination of an appropriate limitations period. The United States therefore has a substantial interest in the effective enforcement of the WARN Act's prohibitions through the civil actions expressly authorized by that Act, and in the proper resolution of the question presented in these cases.

## STATEMENT

1. With exceptions not relevant here, the WARN Act provides that an employer of 100 or more employees "shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. 2102(a). The Act requires that the notice be served "to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee." 29 U.S.C. 2102(a)(1). Notice must also be given to "the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C. 1651 et seq.]," and to "the chief elected official of the unit of local government within which [the] closing or layoff is to occur." 29

U.S.C. 2102(a)(2). The Act identifies those plant closings or mass layoffs for which an employer must give notice according to the number of employees affected, 29 U.S.C. 2101(a)(2) and (3), and defines affected employees as those who "may reasonably be expected to experience" an "employment loss," including termination, a layoff longer than six months, or a greater than 50% reduction in work hours for each of six months. 29 U.S.C. 2101(a)(5) and (6).

The Act provides that "[a]ny employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff." 29 U.S.C. 2104(a)(1). An aggrieved employee may collect "back pay for each day of violation," 29 U.S.C. 2104(a)(1)(A), "up to a maximum of 60 days." 29 U.S.C. 2104(a)(1). An employer who fails to give the requisite notice to an affected unit of local government "shall be subject to a civil penalty of not more than $500 for each day of such violation." 29 U.S.C. 2104(a)(3). An aggrieved employee, his representative, or an aggrieved unit of local government may file a civil action "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. 2104(a)(5). The WARN Act does not establish a statute of limitations for the civil actions authorized by Section 2104(a)(5).

2. These consolidated cases involve suits against employers who are alleged to have violated the Act. Respondents in *North Star* are several non-unionized employees. Respondents filed suit against petitioner North Star Steel Company (NS) on October 23, 1992, alleging that North Star had failed to give 60 days' notice before laying off 270 workers at a Pennsylvania plant on

February 25, 1991. NS Pet. App. 17a. On North Star's motion for summary judgment, the district court held that suits brought under the WARN Act are governed by the six-month limitations period for filing an unfair labor practice charge with the National Labor Relations Board (NLRB) under Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(b). NS Pet. App. 24a. The court therefore dismissed the employees' suit as untimely. *Id.* at 24a-25a. The court rejected respondents' contention that the suit should be governed by the three-year statute of limitations contained in Pennsylvania's Wage Payment and Collection Law. *Id.* at 18a-19a.[1]

In *Crown Cork*, respondent United Steelworkers of America filed suit on October 15, 1992, on behalf of unionized employees. The complaint alleged that petitioner Crown Cork & Seal Company (CC), a national corporation headquartered in Philadelphia, had laid off 85 employees at its Georgia plant on September 30, 1991, without giving 60 days' advance written notice. CC Pet. App. 17a-18a. Relying on the Second Circuit's decision in *United Paperworkers International Union* v. *Specialty Paperboard, Inc.*, 999 F.2d 51 (1993), the

[1] This action by non-union employees followed a successful WARN Act suit brought by the United Steelworkers of America on behalf of unionized employees against North Star arising out of the same layoff. Although the union filed its action more than six months after the layoff, North Star failed to assert a statute-of-limitations defense, and the district court granted summary judgment for the union. See NS Pet. App. 3a. The district court subsequently awarded the union employees back pay for each calendar day of the violation, and the court of appeals affirmed. *United Steelworkers* v. *North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992), aff'd in part, vacated in part on other grounds, 5 F.3d 39, 42 (3d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994).

district court held that "Pennsylvania law provides the appropriate limitations period for civil suits under the WARN Act" and denied Crown Cork's motion for summary judgment. CC Pet. App. 22a, 23a. The court deemed it unnecessary to "determine the particular Pennsylvania statute from which to borrow" because the union's suit was timely under all of the potentially applicable state statutes suggested by the parties. *Id.* at 22a.

3. The court of appeals affirmed the district court's order in *Crown Cork* and reversed the district court's order in *North Star*. NS Pet. App. 1a-16a.[2] The court held that "for actions arising under WARN, courts must apply the most closely analogous state statute of limitations," *id.* at 15a, and it therefore rejected petitioners' contention that the six-month limitations period in Section 10(b) of the NLRA should apply to WARN Act claims, NS Pet. App. 6a-11a.

The court of appeals first noted the general rule that "when a federal statute is silent as to a statute of limitations, the court should apply 'the most closely analogous statute of limitations under state law.'" NS Pet. App. 5a (quoting *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983)). The court

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[2] The Third Circuit's decision in the instant cases and the Second Circuit's earlier decision in *United Paperworkers*, *supra*, conflict with subsequent decisions of the Fifth and Sixth Circuits holding that the six-month limitations period of Section 10(b) of the NLRA applies to WARN Act claims. *United Mine Workers* v. *Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994), petition for cert. pending, No. 94-1398 (filed Feb. 16, 1995); *Halkias* v. *General Dynamics Corp.*, 31 F.3d 224 (1994), reh'g en banc granted, Nos. 93-1664, 93-1680 & 93-8204 (5th Cir. Sept. 22, 1994). The issue is also pending in the Tenth Circuit. *Frymire* v. *Ampex Corp.*, Nos. 94-1059 & 94-1090 (argued Mar. 6, 1995).

acknowledged that "it is sometimes more appropriate to borrow a limitations period from an analogous area of federal law," but observed that this exception is "closely circumscribed." NS Pet. App. 6a (quoting *Reed* v. *United Transp. Union*, 488 U.S. 319, 324 (1989)). The court explained that the exception should be invoked only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." NS Pet. App. 6a (quoting *DelCostello*, 462 U.S. at 172). It emphasized that "the mere fact that a statute touches upon issues of labor law does not mean that the Court must resort to the statute of limitations contained in § 10(b) of the NLRA." *Ibid.*

Applying those principles, the court of appeals concluded that a "vast gulf" exists between the policies underlying the NLRA and the WARN Act. NS Pet. App. 7a, 11a. The primary purpose of the NLRA, the court stated, is to protect the right of workers to organize, to bargain collectively for the terms and conditions of their employment, and to ensure that the bargaining process is fair. The NLRA is not, however, concerned with the substantive terms that emerge from collective bargaining. *Id.* at 7a. The NLRA's six-month statute of limitations for charging an unfair labor practice, the court observed, "represents Congress's view of the proper balancing of the various interests involved in the process of collective bargaining." *Ibid.*

By contrast, the court noted, "any effects [the WARN Act] has on collective bargaining are tangential at best. The benefits of WARN accrue not only to unionized workers but to all workers alike." NS Pet. App. 8a. Moreover, by requiring notice to affected units of local

government, and by permitting local governments to collect civil penalties if the requisite notice is not given, "WARN serves a broader purpose as well, that goes beyond the employer-employee relationship addressed by the NLRA." *Id.* at 9a. The court thus distinguished the WARN Act's notice requirement, which confers "an across-the-board substantive right" on all employees and their communities, from the requirement under the NLRA to provide notice of a plant closing to represented workers, which "protect[s] the meaningfulness of the collective-bargaining process." *Id.* at 10a.

The court of appeals rejected petitioners' argument that application of "multiple state statutes of limitations" to WARN Act claims would raise "serious uniformity concerns." NS Pet. App. 12a. Unlike 42 U.S.C. 1983 and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964, which encompass more complex actions and warrant application of uniform limitations periods, "WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries." NS Pet. App. 13a. Moreover, the court suggested, the WARN Act's venue provision does not provide an especially broad choice of fora, and the site-based nature of a violation should facilitate the identification of the State in which the violation allegedly occurred. *Ibid.* The court further reasoned that the brief six-month limitations period applicable to the filing of charges with the NLRB under the NLRA could "constitute too great a burden" on WARN Act claimants, whose formal complaints must be filed in federal court. *Id.* at 14a. The court concluded that it "need not decide which state statute applies, since the actions would be timely under any of the possible

statutes of limitations brought to the court's attention." *Id.* at 15a.[3]

## SUMMARY OF ARGUMENT

When a federal law provides a cause of action but contains no statute of limitations, this Court's usual practice is to "borrow" a state law limitations period. Petitioners contend that suits under the WARN Act should be governed not by state statutes of limitations, but by the six-month limitations period for bringing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b). That contention should be rejected.

A. Section 10(b)'s comparatively short limitations period reflects Congress's desire for swift resolution of claims implicating the collective bargaining relationship. This Court has stressed in particular the need for expeditious resolution of disputes the outcome of which may affect the continuing relationship between contracting parties. Civil actions under the WARN Act, by contrast, are typically filed after dissolution of the employment relationship. More generally, the NLRA governs the *process* of collective bargaining and private dispute resolution, but does not dictate the substantive terms of the agreement; the WARN Act imposes a substantive obligation that cannot be avoided by agreement of the parties and that augments any similar obligation that the employer has assumed by contract.

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[3] The alleged statutory violation in *Crown Cork* occurred in Georgia, although the suit was filed in Pennsylvania. The court of appeals noted that it "need not decide whether the statute of limitations should be borrowed from Pennsylvania or Georgia law, since no party has brought to the lower courts' attention a statute of limitations, from either state, under which the instant actions would be untimely." NS Pet. App. 14a n.4.

There is consequently no basis for petitioners' attempt to analogize WARN Act suits to unfair labor practice charges under the NLRA.

B. That conclusion is not altered by the fact that some WARN Act violations will also constitute unfair labor practices prohibited by the NLRA. The overlap is far from complete, since the WARN Act applies to unrepresented as well as represented workers and requires more extensive notice than was typically provided to unionized employees before its passage. Moreover, the two Acts serve distinct purposes even with respect to conduct that is governed by both. The WARN Act presumes the termination of the relationship between employer and employees and serves to alleviate the effects of that termination by providing workers time to seek new positions. The NLRA notice requirement, by contrast, serves to facilitate bargaining between the employer and the union regarding the effects of a plant closing.

C. The practicalities of litigation also weigh against application of Section 10(b)'s limitations period to WARN Act claims. Institution of a WARN Act suit will often involve extensive investigation, and will always require the filing of a complaint in court, at a time when the disruptions caused by recent job loss are likely to distract an employee from prosecution of his claim. Application of state law limitations periods, by contrast, will create no extraordinary litigation burdens.

D. Because neither petitioner identifies any potentially applicable state limitations period under which the actions here would be untimely, this Court may affirm the judgment of the court of appeals without deciding which state limitations period is most appropriately applied to WARN Act suits. If this Court chooses to decide that question, however, we believe that

it would be appropriate to apply Pennsylvania's three-year limitations period for actions to recover "unpaid wages or liquidated damages." 43 Pa. Stat. Ann. § 260.9a(g) (1992). Like an award of back pay under the WARN Act, recoveries under that Pennsylvania statute serve both to compensate aggrieved employees for lost wages, and to deter and punish employers' violations of their legal duties.

## ARGUMENT

### THE STATUTE OF LIMITATIONS FOR WARN ACT CLAIMS SHOULD BE BORROWED FROM THE MOST CLOSELY ANALOGOUS STATE LAW

#### A. When A Federal Statute Creates An Express Cause Of Action But Establishes No Limitations Period, The Most Closely Analogous State Statute Of Limitations Is Presumptively Applicable

Like many federal statutes, the WARN Act provides a cause of action for violations but contains no express statute of limitations. "In such situations [the Court does] not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, [its] task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). This Court's decisions recognize a "general rule that statutes of limitations are to be borrowed from state law." *Reed* v. *United Transp. Union*, 488 U.S. 319, 324 (1989); accord *DelCostello*, 462 U.S. at 158 ("We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law."). "Given [the Court's] longstanding practice of borrowing state law, and the congressional awareness of this practice, [the Court] can

generally assume that Congress intends by its silence that [the Court] borrow state law." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987).[4]

Petitioners contend that suits under the WARN Act should be governed not by state limitations periods, but by the six-month limitations period for filing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(b). Petitioners place principal reliance on *DelCostello*, in which this Court held that the Section 10(b) limitations period applied to a "hybrid" suit by employees against both their employer and their union for breaches of the collective bargaining agreement (under Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185) and of the duty of fair representation. See 462 U.S.

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[4] This Court's earlier decisions applied state statutes of limitations to federal claims as a matter of state law, unless Congress expressly provided otherwise. *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-704 (1966); see *Campbell* v. *Haverhill*, 155 U.S. 610, 614-616 (1895); *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) 270, 277-278 (1830); *Agency Holding*, 483 U.S. at 159-162 (Scalia, J., concurring in the judgment). In more recent decisions the Court has continued to hold that state limitations periods apply to federal actions, but on the slightly different theory that Congress's failure to provide a limitations period constitutes an implicit federal directive to "borrow" the state law limitations period for federal claims. *Agency Holding*, 483 U.S. at 158, 164 (Scalia, J., concurring in the judgment); see *Hoosier Cardinal*, 383 U.S. at 706; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946) ("As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."). The result remains, however, that state limitations periods presumptively govern the timeliness of federal claims. See *Hoosier Cardinal*, 383 U.S. at 704.

at 154-155.[5] In our view, *DelCostello* provides scant support for petitioners' position.

The Court in *DelCostello* expressly gave its holding a narrow scope, stressing that the decision "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere." 462 U.S. at 171. The Court reaffirmed that principle in *Reed*, holding that state limitations periods should apply to a union member's claim, under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411(a)(2), that a union had violated his right to

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[5] Petitioner North Star also contends (NS Br. 32-37) that the Court should abandon its practice of borrowing state limitations periods in light of the recent passage of a residual federal statute of limitations. See 28 U.S.C. 1658 (Supp. V 1993) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."). That argument is without merit. Section 1658 applies by its terms only to claims arising under federal statutes "enacted after the date of the enactment of" that section (December 1, 1990), and it therefore "has no application in the present litigation." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n.10 (1991). Congress's refusal to make Section 1658 applicable to actions brought under previously enacted laws indicates its intent that existing legal standards be applied to such statutes. Cf. *Agency Holding*, 483 U.S. at 147. Even if it were relevant to the instant cases, moreover, Section 1658 does not reflect a policy judgment that the most analogous federal limitations period should be "borrowed." It reflects instead Congress's decision that a relatively long (four-year) limitations period should apply unless Congress has expressly enacted a different one. Section 1658 therefore could hardly support petitioners' argument that the suits at issue here, which were filed less than two years after respondents' causes of action accrued, should be dismissed as untimely.

free speech regarding union matters. 488 U.S. at 323. The Court declined to apply the NLRA's six-month limitations period, reiterating that, "'in labor law or elsewhere,' application of a federal statute will be unusual, and 'resort to state law remains the norm for borrowing of limitations periods.'" *Id.* at 324 (quoting *DelCostello*, 462 U.S. at 171). The Court noted that it "decline[s] to borrow a state statute of limitations only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" 488 U.S. at 324 (quoting *DelCostello*, 462 U.S. at 172). *Reed* thus makes clear that the presumption in favor of state-law borrowing survives *DelCostello*, and that it applies with full force to federal labor statutes.[6]

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[6] This Court's subsequent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), casts no doubt on the continuing vitality of those principles. The Court in *Lampf* faced "the awkward task" of determining the appropriate statute of limitations for a cause of action implied under a federal statute. *Id.* at 359. The Court "conclude[d] that where * * * the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Ibid.*

*Lampf* is inapposite here for two reasons. First, the WARN Act provides an *express* right of action. 29 U.S.C. 2104(a)(5). Congress's silence regarding the appropriate limitations period thus suggests congressional acquiescence in this Court's "longstanding practice of borrowing state law," *Agency Holding*, 483 U.S. at 147—an inference that would not be legitimate where

For the reasons that follow, unfair labor practice charges filed with the NLRB under the NLRA furnish a distinctly inapt analogy for suits brought in court under the WARN Act. Application of Section 10(b)'s six-month limitations period in the instant cases is therefore unwarranted.

**B. The NLRA Protects The Process Of Collective Bargaining And Private Dispute Resolution, While The WARN Act Confers Substantive Rights Separate And Distinct From The Collective Bargaining Process**

1. The purpose of the NLRA is to achieve industrial peace by protecting the rights of workers to organize and to bargain collectively over the terms and conditions of their employment. See 29 U.S.C. 151; 29 U.S.C. 141(b) (Labor Management Relations Act, 1947); *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981). To that end, the NLRA focuses on "the formation of the collective agreement and the private settlement of disputes under it" through the grievance and arbitration system. *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966). Section 10(b) was tailored to effectuate those goals. It provides that the General Counsel shall not issue a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b); see 29 U.S.C. 153(d) (functions of General Counsel). In providing for the swift disposition of disputes, "Congress established a limitations period

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the cause of action itself is implied. See *Lampf*, 501 U.S. at 365 (Scalia, J., concurring in part and concurring in the judgment). Second, petitioners in this case do not argue that the limitations period for civil actions under Section 2104(a)(5) should be drawn from some other provision in the WARN Act; they contend instead that the Court should adopt the limitations provision of a different federal statute enacted more than 40 years earlier.

attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *DelCostello*, 462 U.S. at 171 (quoting *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 70 (1981) (Stewart, J., concurring in the judgment)).

Explaining its decision to apply the NLRA's six-month limitations period to hybrid Section 301/duty-of-fair-representation suits, the *DelCostello* Court stressed the importance of speedy resolution of disputes concerning the collective bargaining process, observing that

> the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. This system, with its heavy emphasis on grievance, arbitration, and the law of the shop, could easily become unworkable if a decision which has given meaning and content to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as three years later.

462 U.S. at 169 (quoting *United Parcel Serv.*, 451 U.S. at 64 (brackets, ellipsis, and internal quotation marks omitted). The Court thus recognized that application of the NLRA's comparatively short limitations period to hybrid Section 301/duty-of-fair-representation suits is justified, in substantial measure, by the fact that adjudication of such actions (like the NLRB's investigation and prosecution of unfair labor practice charges) frequently involves resolution of disputes whose outcome may affect the *continuing* relationship

between contracting parties.[7] The smooth functioning of that relationship obviously depends upon expeditious resolution of any disputes that may arise. Civil actions under the WARN Act, by contrast, are typically filed *after* the dissolution of the employment relationship, and a central justification for the unusually short limitations period established by Section 10(b) of the NLRA is consequently inapplicable.

2. More generally, a claim under the WARN Act neither resembles an unfair labor practice charge nor directly implicates the "federal interests in stable bargaining relationships and in private dispute resolution" between represented workers and employers that the six-month limitations period of Section 10(b) accommodates. *Reed*, 488 U.S. at 333.[8] The NLRA is

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[7] As this Court observed in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), "[t]he processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement"; "[t]he grievance procedure is, in other words, a part of the continuous collective bargaining process." The arbitrator's resolution of a grievance thus does more than terminate a particular dispute. It serves as well to shape the contracting parties' understanding as to the parameters of their agreement, and forms part of the backdrop to their subsequent negotiations. Given the influence of arbitral decisions upon subsequent interaction between the parties, speedy resolution of any challenges to those decisions is essential.

[8] In *Reed*, the Court explained that in *DelCostello* "[t]he specific focus of our comparison between unfair labor practice charges governed by § 10(b) and hybrid § 301/fair representation claims was their effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures." 488 U.S. at 329. This Court in *Reed* deemed the interests in stable bargaining relationships and private dispute

"concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 753 (1985); accord *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 20 (1987). The WARN Act, by contrast, imposes a substantive obligation that cannot be avoided by agreement of the parties[9] and that augments any similar obligation that the employer has assumed by contract.[10] Moreover, the

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resolution implicated in only a "tangential and contingent" fashion (488 U.S. at 328) by free speech claims brought by a union member under Title I of the LMRDA, 29 U.S.C. 411(a)(2). Because the LMRDA is concerned with internal union affairs, it was "not directly related in any way to collective bargaining or dispute settlement under a collective-bargaining agreement." *Reed*, 488 U.S. at 330. The Court contrasted an LMRDA suit to "hybrid" Section 301/duty-of-fair-representation claims, "which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures." *Id.* at 331. Accordingly, the Court analogized the LMRDA action to a state personal injury claim and refused to apply the six-month limitations period of Section 10(b).

[9] See 20 C.F.R. 639.1(g) ("[c]ollective bargaining agreements" may "clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights").

[10] An employer's WARN Act liability may be offset by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. 2104(a)(2)(B). The legislative history indicates that this language was fashioned to ensure that severance payments made pursuant to a collective bargaining agreement could not be deducted in determining the employer's WARN Act liability. Cf. 134 Cong. Rec. 15,928 (1988) (Sen. Metzenbaum) (opposing proposed amendment on the ground that "the employees may already be entitled to severance pay and benefits under a collective bargaining agree-

WARN Act's provision for civil penalty actions by affected units of local governments has no analogue in the NLRA.

In short, the WARN Act "implements a federal policy * * * that simply had no part in the design of a statute of limitations for unfair labor practice charges." *Reed*, 488 U.S. at 332. The WARN Act thus resembles the state "minimum substantive labor standard[]" at issue in *Fort Halifax*, 482 U.S. at 20, which this Court held not to be preempted by the NLRA because it "does not intrude upon the collective-bargaining process." *Id.* at 6-7. The Maine law in *Fort Halifax* required certain employers that closed or relocated their businesses to make severance payments according to a statutory formula; it authorized affected employees, or a state official in their stead, to sue a noncomplying employer to recover the severance pay. *Id.* at 5. Like the Maine law, the WARN Act protects "individual union and nonunion workers alike, and thus 'neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA.'" *Id.* at 21 (quoting *Metropolitan Life*, 471 U.S. at 755). Absent an effect on collective bargaining, it would therefore be inappropriate to subject WARN Act claims to the NLRA's six-month limitations period. See *United Paperworkers International Union* v. *Specialty Paperboard, Inc.*, 999 F.2d 51, 54 (2d Cir. 1993).[11]

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ment[.] * * * The [proposed] amendment would allow employers who already owe severance pay to escape the notice requirement simply by paying the severance they already owed. * * * [T]hat is unfair."). See also 29 U.S.C. 2105 (WARN Act rights are "in addition to, and not in lieu of, any other contractual or statutory rights or remedies of the employees").

[11] In *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Court applied a state limitations period to a union's

3. Petitioners also emphasize (NS Br. 19; CC Br. 12-15) that where employees are represented by a union, Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), requires an employer to bargain over the effects of a decision to shut down part of its business. See *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). Because such bargaining "must be conducted in a meaningful manner and at a meaningful time," *id.* at 682, an employer's failure to give adequate notice of its intention to close a plant will sometimes constitute an unfair labor practice. Petitioners argue that this overlap between the prohibitions of the NLRA and the WARN Act suggests a congruence of purpose that justifies application of the Section 10(b) limitations period to WARN Act suits. That argument is without merit.

First, it is hardly the case that every violation of the WARN Act will also constitute an unfair labor practice

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suit under Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185, for breach of a collective bargaining agreement by an employer. Discussing that prior decision, the Court in *DelCostello* stressed the distinction between a "straightforward breach-of-contract suit under § 301," like *Hoosier Cardinal*, and a hybrid Section 301/duty-of-fair-representation claim, "amounting to a direct challenge to the private settlement of disputes under the collective-bargaining agreement." 462 U.S. at 165 (brackets and internal quotation marks omitted). The Court in *DelCostello* thus made clear that suits implicating private resolution of disputes affecting the collective bargaining process raise concerns distinct from other actions grounded in federal labor law. See also *id.* at 162-163 ("national uniformity is of less importance when the case does not involve 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it' ") (quoting *Hoosier Cardinal*, 383 U.S. at 702).

prohibited by the NLRA. Unlike Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), which requires the employer "to bargain collectively with the representatives of his employees" regarding the effects of a plant closing, the WARN Act confers a right to notice of an impending plant closing upon represented and unrepresented workers alike, as well as upon enumerated governmental entities. Prior to the WARN Act's passage, moreover, unionized workers received an average of only 14 days' advance notice before a plant closing or mass layoff. See S. Rep. No. 62, 100th Cong., 1st Sess. 13 (1987). By mandating 60 days' notice for all workers, Congress clearly intended to supplement existing rights under the NLRA.

Second (and more fundamentally), the WARN Act and the NLRA serve distinct purposes even with respect to conduct that is governed by both.[12] The purpose of the WARN Act's notice requirement is to protect "workers, their families and communities" by providing "transition time to adjust to the prospective loss of employment," to seek other jobs, and to obtain "skill training or retraining" to "compete in the job market." 20 C.F.R. 639.1(a). Congress tailored the provisions of the WARN Act to effectuate those purposes. It mandated a minimum of 60 days' advance notice to enable dislocated employees to adjust their finances to the impending job loss and afford them an early opportunity to begin a

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[12] In *Reed*, this Court held that the Section 10(b) limitations period should not be applied to claims under Title I of the LMRDA even if it were assumed that the alleged Title I violations would also constitute unfair labor practices and breaches of the duty of fair representation. 488 U.S. at 333 n.7. The Court explained that any such "overlap * * * would not be attributable to similar federal policies underlying each of these areas of protection, for the policies behind [the relevant prohibitions] are quite different." *Ibid.*

job search. See S. Rep. No. 62, *supra*, at 9, 10-11. In addition, Congress mandated that employers simultaneously give notice to designated local and state officials to enable them to provide job counseling, evaluation, and training services at the worksite before employees have dispersed; the statutory goal is to speed the reintegration of dislocated employees into the work force, while reducing the broader social costs of unemployment insurance, welfare services, and a diminished local economy. *Id.* at 5, 10-12. The purpose of the NLRA's notice-of-plant-closing requirement, by contrast, is to facilitate collective bargaining between the employer and the union regarding the effects of the plant closing.[13] Because "[t]he purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss for both the workers and the community in which they live," *United Paperworkers*, 999 F.2d at 54, application of the Section 10(b) limitations period is inappropriate.[14]

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[13] In a recent decision, the NLRB similarly emphasized the distinction between WARN Act and NLRA rights. The Board ruled that payments required by the WARN Act may not be credited against payments required to remedy a violation of Section 8(a)(5) of the NLRA. It noted that "WARN payments remedy the Respondent's violation of its obligations to give advance notice of its decision to cease operations. The [NLRA] payments remedy the Respondent's violation of its obligations to allow for meaningful bargaining over the effects of its decision to cease operations." *Times Herald Printing Co.*, No. 16-CA-15433, 1994 NLRB LEXIS 972, at *12 (NLRB Nov. 30, 1994).

[14] Petitioner Crown Cork relies (CC Br. 15-17) upon the similarities between the WARN Act's precursors and the NLRA requirement to engage in collective bargaining over the effects of plant closings and layoffs. Petitioner acknowledges, however, that the predecessor bills "would have required employers not only to notify but also to consult with employees or their exclusive

### C. The Practicalities Of Litigation Weigh Against Application Of The NLRA's Limitations Period To WARN Act Claims

The practicalities of litigation also militate against application of Section 10(b)'s limitations period to WARN Act claims. The NLRA's six-month limitations period would create significant problems in the litigation of such claims, thwarting the remedial purpose of the Act. On the other hand, application of state limitations periods should present no unusual problems for WARN Act litigants.

In determining which statute of limitations to apply, this Court has considered whether the limitations period affords sufficient time to vindicate effectively the right protected, particularly when the occurrence of the violation may be difficult to detect and the assistance of counsel will be needed to frame and file a suit. See, *e.g.*, *Agency Holding*, 483 U.S. at 154 ("unduly short state statutes of limitations * * * thwart the legislative purpose of creating an effective remedy"); *Reed*, 488 U.S. at 327 (selecting personal injury statute that generally affords a one-year limitations period rather than Section 10(b)); *DelCostello*, 462 U.S. at 165-166 (rejecting 90-day state limit in favor of Section 10(b)'s six-month limit where unsophisticated employee will need to evaluate union's representation and retain counsel); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 368-369 (1977); *Hoosier Cardinal*, 383 U.S. at 707 n.9; *Campbell* v. *Haverhill*, 155 U.S. 610, 615 (1895).

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representative before closing a plant." *Id.* at 16. In our view, the elimination of consultation requirements from the WARN Act as passed reinforces the inference that the notice required by the Act serves a purpose different from that served by the notice required by the NLRA. Under the WARN Act, the opportunity to negotiate with the employer is simply an incident of the notice afforded, not its primary purpose. See pages 20-21, *supra*.

Section 10(b)'s six-month limitations period is too short to vindicate WARN Act rights effectively because a violation of the WARN Act may often be difficult to ascertain. Determining whether a "plant closing" has occurred requires knowledge of the number of original employees and the number of part-time employees as defined by their hours of work. 29 U.S.C. 2101(a)(1), (2) and (8). Identifying a "mass layoff" requires knowledge of the number and percentage of employees laid off over any 30-day or 90-day period, taking into account employees who have been offered a transfer. 29 U.S.C. 2101(a)(3), 2101(b)(2), 2102(d). Assessing the merit of a WARN Act claim also requires potential litigants to determine whether any of the exemptions from and reductions in the Act's 60-day notice period, see 29 U.S.C. 2102(b), 2103, are applicable to their cases. Even assuming that unions could acquire and evaluate the information necessary to substantiate a violation of the Act, unrepresented claimants will frequently be unable to do so. Finally, a WARN Act claimant who suspects a violation will need to retain an attorney to evaluate the case and file a complaint in federal district court, subject to the strictures of Fed. R. Civ. P. 11(b)(3).[15] The ur-

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[15] As the Second Circuit has recognized, see *United Paperworkers*, 999 F.2d at 55, the requirement that a WARN Act claim be filed in federal district court weighs against the application of Section 10(b)'s six-month limitations period. Under the NLRA, the claimant's duty is limited to the filing of a charge with the NLRB, which determines whether a complaint should be issued and bears responsibility for prosecuting the case. *Ibid.* Thus, "[t]he burden on [NLRA] complainants in pursuing a claim is minimal, justifying the short statute of limitations." *Ibid.* The statutes cited by petitioners (NS Br. 28; CC Br. 27-28) for the proposition that federal employment laws typically contain short limitations periods similarly provide for enforcement by

gency of finding a new job, and the participation in the very services for dislocated workers that the Act promotes, see 29 U.S.C. 2102(a)(2) (mandating notice to state dislocated workers unit and local government), may distract aggrieved employees from immediate pursuit of a possible WARN Act claim. The six-month limitations period of Section 10(b), suited to the filing of an administrative charge with the NLRB, often will not permit the effective exercise of WARN Act rights in a judicial forum.

Petitioners also contend that a short limitations period is necessary in order (1) to further the WARN Act's purpose to provide prompt assistance to displaced workers (NS Br. 30-31; CC Br. 25-26), and (2) to protect employers from the burden of litigating stale claims (NS Br. 31-32; CC Br. 26-27). As to the former point: The WARN Act requires that *notice* of an impending plant closing or mass layoff be provided in a timely fashion in order to ensure prompt assistance to displaced workers; effectuation of that purpose does not depend on adoption of the Section 10(b) limitations period for the filing of a suit after the closing or layoff has already occurred.

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administrative bodies. By contrast, federal labor statutes that require the commencement of actions by the filing of a complaint in court typically provide longer limitations periods. See, *e.g.*, Portal-to-Portal Act of 1947, 29 U.S.C. 255(a) (two-year limitations period, or three years for willful violation, for Fair Labor Standards Act of 1938, Walsh-Healey Act, or Bacon-Davis Act); Employee Retirement Income Security Act of 1974, 29 U.S.C. 1113 (for breach of fiduciary duty, suit may be filed within six years after violation or three years after actual knowledge of the breach); Employee Polygraph Protection Act of 1988, 29 U.S.C. 2005(c)(2) (three-year limitations period); Family and Medical Leave Act of 1993, 29 U.S.C. 2617(c)(1)-(2) (Supp. V 1993) (two-year limitations period or three years for willful violation).

Moreover, adoption of a longer limitations period drawn from state law will not prevent employees or their representatives from filing suit within six months, and it is bizarre in any event to suggest that adoption of the shorter Section 10(b) period will further the interests of potential plaintiffs. As to the latter: Concern for the possibility of stale claims could serve to rebut the presumption in favor of state-law borrowing only if the likelihood that relevant evidence will become unavailable were *especially* great in the WARN Act context. In fact, quite the contrary is true. Because resolution of a WARN Act suit will generally turn on documentary evidence rather than on testimony based upon personal recollection, accurate disposition of litigation brought under the Act is particularly *un*likely to be impaired by the passage of time.[16]

Finally, application of state limitations periods to WARN Act claims creates no extraordinary risk of forum shopping. First, it is unclear whether a federal court would borrow the statute of limitations from the law of the forum State or that of the State in which the violation occurred. Compare NS Pet. App. 14a n.4 and *Halkias* v. *General Dynamics Corp.*, 31 F.3d 224, 236-237 (1994) (suggesting forum State), reh'g en banc granted, Nos. 93-1664, 93-1680 & 93-8204 (5th Cir. Sept. 22, 1994) with *United Paperworkers*, 999 F.2d at 56 & n.9 and *Halkias*, 31 F.3d at 247 (Wisdom, J., dissenting)

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[16] As petitioner North Star acknowledges (NS Br. 32 n.15), federal law requires the preservation of employment records for a three-year period. See 29 C.F.R. 516.5; 29 C.F.R. 1627.3(a). Of course, nothing prevents a prudent employer from maintaining such records for a longer period. Maintenance of the evidence needed to defend against a WARN Act suit is thus entirely within a potential defendant's control.

(suggesting State of violation).[17] If the statute of limitations is drawn from the law of the State of violation, of course, then there is no advantage to forum shopping. Even if the limitations period of the forum State applies, venue options are not unusually expansive under the WARN Act.[18] Such claims are not inherently multistate in nature; there will usually be only a single site of violation, and thus no choices available in that regard. Also, the option of suing where the employer transacts business is actually narrower than the generally applicable venue provisions in 28 U.S.C. 1391(c), which permits suit against a corporation "in any judicial district in which it is subject to personal jurisdiction." See D. Siegel, *Commentary on 1988 and 1990 Revisions of Section 1391*, 28 U.S.C.A. 1391, at 17-19 (current venue statute permits suit not only where the corporation is doing business, but also in any district in which a state long-arm statute would permit out-of-state service). Thus, forum shopping under the WARN Act would be no more problematic than under other federal statutes in which state statutes of limitations are borrowed and where venue is governed by 28 U.S.C. 1391(c). See *Halkias*, 31 F.3d at 247 (Wisdom, J., dissenting).

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[17] Even if the district court applies the law of the forum State, that law may include a state borrowing statute mandating application of the limitations period of the State where the cause of action arose. See *Cope* v. *Anderson*, 331 U.S. 461, 464-468 (1947).

[18] Suits under the WARN Act may be brought in any district in which the violation is alleged to have occurred or in which the employer transacts business. 29 U.S.C. 2104(a)(5).

**D. Pennsylvania's Three-Year Limitations Period For Actions To Recover "Unpaid Wages Or Liquidated Damages" Provides The Most Appropriate State Law Analogue For WARN Act Claims**

The court of appeals concluded that it "need not decide which state statute applies, since the actions would be timely under any of the possible statutes of limitations brought to the court's attention." NS Pet. App. 15a. In this Court as well, neither petitioner identifies any potentially applicable state limitations period under which the actions here would be untimely. This Court therefore may affirm the judgment of the court of appeals without deciding which state limitations period is most appropriate.

If the Court chooses to resolve the question, however, we believe that it would be appropriate to apply Pennsylvania's three-year limitations period for actions to recover "unpaid wages or liquidated damages." 43 Pa. Stat. Ann. § 260.9a(g) (1992).[19] An employee's remedy for

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[19] As noted above, see note 3, *supra*, the alleged statutory violation in *Crown Cork* occurred in Georgia, although suit was filed in Pennsylvania. Because petitioner Crown Cork has not contended that the district court should have borrowed a limitations period from Georgia law, we have confined our analysis to the law of Pennsylvania.

Petitioner North Star observes that, "[g]iven the obvious similarities in WARN litigation, there exists no suggestion in any reported case or comment that the limitations period for WARN should vary based upon the factual issues presented in each case." NS Br. 13 n.4. We agree that the appropriate characterization of a WARN Act suit does not depend upon the facts of a particular case. It does not follow, however, that WARN Act suits in States other than Pennsylvania would inevitably be governed by the state statute of limitations applicable to suits for unpaid wages. Application of a different limitations period might be warranted, either because the law of that State furnished an even more precise

a WARN Act violation is "back pay for each day of violation," 29 U.S.C. 2104(a)(1)(A), measured by reference to the employee's "regular rate," 29 U.S.C. 2104(a)(1)(A)(i) and (ii). The Act thus serves in part to compensate aggrieved employees for the wages they would have earned had the plant remained in operation for the requisite 60 days after the employer gave notice of its impending closure.

The "back pay" remedy available under the WARN Act serves substantial noncompensatory purposes as well. The Act provides that the amount of back pay for which a noncomplying employer is liable shall be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. 2104(a)(2)(A). The Conference Report makes clear that "the only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988). The absence of an offset for wages earned from another employer makes clear that Congress intended to deter and penalize violations of the Act, and to ensure that employees have the security of continuing their existing employment for each day of the 60-day notice period, rather than simply to provide aggrieved employees with the wages they would have earned had no violation occurred.[20] Those punitive and deterrent

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analogue, or because the limitations period governing wage payment suits was so short as to frustrate effective enforcement of the WARN Act.

[20] In contrast to the WARN Act remedy, back pay typically is intended to place an aggrieved employee in the same position he would have occupied but for the employer's unlawful action, and

purposes, however, also inform Pennsylvania's wage payment law, which provides for "liquidated damages [in] an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars ($500), whichever is greater," as a remedy for bad-faith refusal to pay wages owed. 43 Pa. Stat. Ann. § 260.10 (1992). Compare S. Rep. No. 62, *supra*, at 24 (WARN Act back pay remedy "is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings").[21] The three-year limitations period specified by 43 Pa. Stat. Ann. § 260.9a(g) (1992), which applies to actions "for the collection of unpaid wages or liquidated damages," therefore appears to us to furnish an appropriate analogue for an employee's WARN Act claim.

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thus ordinarily includes an offset for wages earned from another employer. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941) (NLRA); *United States* v. *Burke*, 112 S. Ct. 1867, 1873-1874 (1992) (Title VII of the Civil Rights Act of 1964).

[21] The Senate Report accompanied a predecessor version of the Act. That version included the "back pay for each day of violation" and "regular rate" formulations, but its treatment of fringe benefits differed somewhat from the Act as later passed. See S. Rep. No. 62, *supra*, at 68.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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NORTH STAR STEEL COMPANY,
*Petitioner,*
v.
CHARLES A. THOMAS, *et al.*,
*Respondents.*

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CROWN, CORK & SEAL CO., INC.,
*Petitioner,*
v.
UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC., JOHN HALKIAS, BARRY JACKSON,

(Additional *Amici* Listed Inside Cover)

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## QUESTION PRESENTED

In actions brought under the Workers' Adjustment Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq.*, should courts borrow an analogous state limitations period, or another analogous federal statute, or rely instead upon the six-month period provided for in the National Labor Relations Act (NLRA), 29 U.S.C. § 160 (b)?

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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**BRIEF OF *AMICI CURIAE* CALIFORNIA RURAL LEGAL ASSISTANCE, INC., JOHN HALKIAS, BARRY JACKSON, THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE, AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF INTEREST OF *AMICI CURIAE* *

CALIFORNIA RURAL LEGAL ASSISTANCE, INC. (CRLA) is a legal services program serving the needs of the rural poor. CRLA is particularly concerned about the impact that the adoption of a six-month statute of limitations would have on its clients—seasonal farmworkers—in WARN Act cases. These employees typically have a long and continuous employment relationship with the growers who employ them—in some cases ten years or more. In California, many agricultural producers, who for years maintained their own workforces, are terminating their employees' jobs. For those workers fortunate enough to find other employment the result is lower wages, less job security and a loss of benefits. The impact on the workers, who have planned their lives on the assumption that they would have steady employment, is no less devastating than on other workers. Typically, the growers do not provide 60 days notice prior to the plant closing nor do they give notice to the State dislocated worker unit as required by law. These workers are unfamiliar with the legal system, uninformed as to their legal rights, and lack information concerning how to obtain legal representation. Adoption of a six-month statute of limitations would deprive many of the workers of any redress under the law.

JOHN HALKIAS (now deceased) and BARRY JACKSON are class representatives of a class comprised of non-union/salaried employees holding various positions of employment at the General Dynamics Corporation plants in Fort Worth, Texas, and Tulsa, Oklahoma. The class consists of approximately 2,000 non-union/salaried employees who were laid off in January and February of 1991 without being provided the sixty day notice required by WARN. General Dynamics has claimed that cancel-

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* Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

lation of the A-12 Jet Aircraft contract by the United States Navy allowed them to accomplish this layoff without the requisite notice. On June 24, 1993, the District Court granted a motion dismissing the claim finding that the six month statute of limitations under the NLRA governed. On August 24, 1993, the United States Court of Appeals for the Fifth Circuit affirmed this decision with a dissent by Judge Wisdom. On September 22, 1994, without request from any party, the appellate court determined on its own motion to rehear the case en banc, but has put the case on administrative hold awaiting the Supreme Court's opinion in this action. Obviously, this class has a direct interest in the outcome of this litigation.

THE FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL was established in 1988 and is a nationwide network of 32 community-based organizations challenging deindustrialization by implementing models for local, state and federal community-responsible industrial policy. Among its member organizations are: Cleveland Coalition Against Plant Closings; Midwest Center for Labor Research of Chicago, Illinois; Seattle Workers' Center; Tennessee Industrial Renewal Network of Knoxville, Tennessee; Tri-State Conference on Manufacturing of Pittsburgh, Pennsylvania; Coalition for Economic Justice of Buffalo, New York; Tompkins/Cortland Labor Coalition of Ithaca, New York; CommonWorks of Syracuse, New York; the Ohio Valley Industrial Renewal Project of Wheeling, West Virginia; and the Working Group on Economic Dislocation of St. Paul, Minnesota.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT) is the largest union affiliated with the AFL-CIO representing 1.4 milion members under 26,000 collective bargaining agreements throughout the United States and Canada. Approximately 80,000 members of the IBT are currently employed in the trucking industry and are covered by the Teamsters' National

Master Freight Agreement. The deregulation of the trucking industry in 1980 resulted in a large number of shutdowns of general freight motor carriers impacting a significant number of Teamster members employed in that industry. Teamster membership in other industries has also been impacted by plant closings around the country. The IBT has a substantial interest in insuring that the federal rights of its members under the WARN Act are effectively enforced.

The INTERNATIONAL LADIES' GARMENT WORKERS' UNION is one of the largest unions in the United States and Canada representing apparel and clothing workers. It has about 155,000 members and in June 1995 it is scheduled to merge with the Amalgamated Clothing and Textile Workers' Union which will result in the creation of the largest union of garment and textile workers on the American continent with 335,000 members. Garment and textile workers are low paid and typically insensitive to their legal rights. Many are newly arrived immigrants with poor language skills. Only about 25% to 30% are represented by unions. Garment and textile workers, like farm workers, work in a highly seasonal industry. Many of these workers, union and non-union alike, would be deprived of any redress under the WARN Act if a six month statute of limitation was adopted.

The INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA (UAW) is a labor organization of about 900,000 active members and more than 500,000 retired members. The UAW has been and continues to represent their members in litigation pursuant to the WARN Act. Accordingly, the UAW joins in the filing of this brief in support of Respondents.

The OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAWIU) is a labor organization which represents employees throughout the

country. The right of OCAWIU to file WARN claims on behalf of its members will be directly affected by the outcome of this proceeding. OCAWIU has been, and continues to represent their members in WARN Act litigation. For these reasons, the OCAWIU submits this *amici curiae* on behalf of Respondents.

The UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION (UMWA) is a labor organization headquartered in Washington, D.C. The UMWA has approximately 200,000 members in the United States, most of whom are coal miners. The UMWA and its members, as well as coal dependent communities throughout the country's coal fields, have a significant interest in the rigorous enforcement of the WARN Act due to the nature of coal as a depletable resource, thus occasioning the continuous shutdown and relocation of mining operations. The UMWA has and continues to represent their members in WARN Act litigation. Therefore, the UMWA joins in this brief in support of Respondents.

The MAURICE AND JANE SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE (Guild Law Center) is a national public interest litigation center that has concentrated its efforts in the area of plant closings and mass layoffs, particularly on the rights of dislocated workers through the enforcement of the WARN Act. As the national clearinghouse for all WARN Act litigation, the Guild Law Center represents hundreds of workers directly and thousands indirectly by providing technical assistance to their attorneys. The Guild Law Center is currently representing both union and non-union workers in three cases which will be affected by a ruling from this court: *Wallace, et al. v. Detroit Coke Corporation, et al.*, 92 CV72890-DT (filed 4/28/92); *Oil, Chemical and Atomic Workers Union v. RMI Titanium Company*, C.A. # 4:92 CV 1679 (N.D.E.D. Ohio) filed 8/16/92), and *Oil, Chemical and Atomic Workers Union v. El Paso/CIT*, Case No. H-93-3506 (S.D. Tex.) (filed 11/3/93). The

Guild Law Center thus represents the interests of WARN plaintiffs across the country, in the outcome of this proceeding, and submits this *amici curiae* brief on behalf of Respondents

The UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC, is a labor organization of 1,400,000 members representing workers across the United States in the meat packing and other food processing, supermarket and other retail, nursing home and hospital, and insurance industries. UFCW membership has experienced many plant closings and mass layoffs in the current economic climate. The WARN Act statute of limitations issue directly impacts the UFCW, as the Union has experienced first-hand and time-consuming complexities of concurrently assisting displaced workers in enforcing their employment rights upon dislocation and preparing for future work. The UFCW is currently representing former members in WARN Act litigation; one case in the United States District Court for the Eastern District of Missouri involves the very issue which is the subject of the Court's review in these consolidated cases. Accordingly, the UFCW has a keen interest in the issue being litigated and joins in this brief in support of Respondents.

The issues presented in this case have a direct impact on the rights of the clients and members of the *amici* herein. The several hundred thousand workers represented by the *amici* have an interest in the outcome of this litigation because it will directly affect their ability to effectively enforce their substantive federal rights under WARN. *Amici* urge this Court to adhere to the usual rule of borrowing a limitations period from state law because the analogous state statute of limitations provide a closer fit than does the National Labor Relations Act.

## SUMMARY OF ARGUMENT

This Court should follow the general rule which calls for applying an analogous state statute of limitations where Congress has not provided a specific limitations period in a federal cause of action in actions brought pursuant to the Worker's Adjustment Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* (WARN). The Court of Appeals correctly applied this standard in the consolidated cases below. *Crown, Cork & Seal Co., Inc. v. United Steelworkers of America*, 32 F.3d 53 (3rd Cir. 1994), *cert. granted*, —— U.S. ——, 115 S.Ct. 715, 130 L.Ed.2d 622 (U.S. Jan. 6, 1995) (No 94-835) and *North Star Steel v. Thomas*, 32 F.3d 53 (3rd Cir. 1994), *cert. granted*, —— U.S. ——, 115 S.Ct. 715, 130 L.Ed. 2d 622 (U.S. Jan. 6, 1995) (No. 94-834).

Petitioners' attempt to apply the six-month period available under the § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), should be rejected as inappropriate for WARN claims and unwise as a matter of public policy. This was recognized by Judge Wisdom in a passionate dissent in the case *Halkias v. General Dynamics*, 31 F.3d 224 (5th Cir. 1994), *en banc reh'g granted*, Nos. 93-1664, 93-1680, 93-8204 (5th Cir. Sept. 22, 1994), which addressed the identical question presented here.[1] He stated:

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[1] The United States Court of Appeals for the Fifth Circuit decision in *Halkias* was the first appellate court to deviate from the general rule regarding borrowing of state limitations period in WARN Act litigation. The first two appellate courts to address this issue followed this Court's practice. *United Paperworkers Int'l Union And Its Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2nd Cir. 1993); *Crown, Cork & Seal Co.*, 32 F.3d 53, and *North Star Steel*, 32 F.3d 53. The Fifth Circuit subsequently vacated its decision and scheduled, sua sponte, a rehearing en banc. Shortly after, the United States Court of Appeals for the Sixth Circuit applied the six-month limitations period within the NLRA. *United Mine Workers v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994).

> [T]he six months time frame will actually serve to stymie [the Worker's Adjustment Retraining Notification Act's] true objective of giving workers and communities advance notice of impending hard times. By severely limiting the time frame in which potential WARN plaintiffs may file suit, companies can relax a bit and rest assured that they may "make redundant" many legally unsophisticated and unsuspecting workers—particularly non-unionized workers—without suffering the community backlash that will follow an announcement and, better, without the threat of future litigation. An extended limitations period, on the other hand, would function as a deterrent and, thus an enforcement mechanism.

*Id.* at 248.

WARN Act litigation implicates no collective bargaining rights dictating quick resolution. Moreover, WARN Act rights are, and were specifically intended to be, broader than rights existing under the federal labor laws; the purpose of the WARN Act is not to ensure labor peace but to alleviate the distress associated with job loss for both the workers and the community in which they live. Furthermore, a six-month statute is completely incompatible with a cause of action under the WARN Act's mass layoff provision [2] which expressly requires six months to ripen. Finally, unlike NLRA actions which provide for administrative resolution, dislocated workers seeking to enforce their rights under the WARN Act must assume a much greater burden when seeking recourse themselves through the courts.

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[2] It is noteworthy that the WARN Act makes no distinction between claims brought as the result of a mass layoff and those brought as the result of a plant closing, other than the six month employment loss and its one-third workforce requirements for a mass layoff claim.

## ARGUMENT

### I. THIS COURT SHOULD APPLY THE TRADITIONAL PRINCIPLES OF *BORROWING*

The circumstances under which federal courts may apply an analogous limitations period from federal, as opposed to state, law are "closely circumscribed." *Reed v. United Transportation Union*, 488 U.S. 319, 324 (1989) (borrowing state period for intra-union lawsuits). The "usual rule" when Congress fails to specify a limitations period in a federally created cause of action is to "borrow" the state statute of limitations that is most analogous to the federal cause of action. *Lampf, Pleva Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991). In *Lampf* this Court stated:

> It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court "borrows" or "absorbs" the local time limitation most analogous to the case at hand.

*Id.* at 255.[3] *See also Reed*, 488 U.S. at 324 (1989); *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980) (applying state period for federal civil rights claims); *Wilson v. Garcia*, 471 U.S. 261 (1985) (applying state period for federal civil rights claims); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (applying state period for federal employment discrimination claims).

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[3] In *Lampf* this Court permitted application of a federal limitations period to claims brought under Section 10(b) of the Securities Exchange Act because "Congress had provided an express limitations period for correlative remedies within the same enactment." *Lampf*, 350 U.S. at 362 (footnote omitted). Contrary to Petitioner's assertion, Brief at 12, that a majority of this Court agreed to a three-tiered "hierarchical" approach to the *DelCostello* doctrine, this Court was unanimous in its reaffirmation that state limitation periods should govern where Congress does not specify a limitations period.

The Court has drawn an exception to the general rule in a narrow class of cases:

> ". . . when a rule from elsewhere in the federal law clearly provides a closer analogy than available in state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking . . ."

*DelCostello v. International Brhd. of Teamsters*, 462 U.S. 151, 172 (1983); *Lampf*, 501 U.S. at 356; *Reed*, 488 U.S. at 324.

The arguments raised in support of application of a federal statute of limitation drawn from § 10(b) of the National Labor Relations Act either ignore or grossly distort the presumption which this Court has frequently found in favor of analogous state statutes of limitations. The prior decisions of this Court indicate that departures from the presumption in favor of state statutes of limitations are appropriate only where application of a state statute would adversely affect federal rights. This Court has held that in certain limited circumstances, "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In these circumstances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose of operation of federal substantive law." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987) (application of federal limitations period in claims brought pursuant to RICO because RICO "encompass[ed] numerous diverse topics and subtopics"); *DelCostello*, 462 U.S. at 161 (applying "narrow exception" for federal "hybrid" action to enforce rights under collective bargaining agreement).

Thus, the question presented in this case is not whether § 10(b) is "more" analogous than the most analogous state statute of limitations, or whether, on balance, appli-

cation of a uniform federal standard would be simpler or more convenient than use of a state statute of limitations. Instead, this Court has so consistently applied state limitations periods to federal laws with no explicit period of limitations that, "we can generally assume Congress intends by its silence that we borrow state law." *Agency-Holding Corp.*, 483 U.S. at 147. This assumption of Congressional intent can only be overcome where there is some failing of the analogous state law—something incompatible between the state statute and the federal rights to be secured such that it would be "inappropriate to conclude that congress would choose to adopt state rules . . . ." *Id.*

The beginning point of the analysis must therefore be the state statute of limitations. And "[i]f an analogous state statute of limitations is found, it should be used, provided it is not at odds with federal substantive law." *Halkias*, 31 F.3d at 242-243 (J. Wisdom, dissenting). In this case, the analogous state statute of limitations which the Respondents urge this Court to adopt are not in any way at odds with the substantive federal policies contained in the WARN Act.

Petitioners' have therefore, boldly and significantly, attempted to alter the impact of the presumption in favor of state statutes of limitations. The entire premise of the Petitioners' argument is thus flawed. Contrary to the Petitioners' assertion, the current doctrine is not "fatally defective." The Petitioners erroneously identify the Rules of Decision Act as the genesis of the doctrine. *See Agency Holding Corp.*, 483 U.S. at 157 (*Scalia*, concurring). However, this Court has "applied state limitations periods to federal causes of action because we believed that those state statutes applied of their own force, unless pre-empted by federal law." *Id.*

Nonetheless, the Petitioners ask this Court to abolish its long-standing practice solely because Congress has seen fit to require that all civil claims arising under fed-

eral legislation passed after December 1, 1990, be subject to a new "fallback" statute of limitations. 28 U.S.C. § 1658. Yet, the Petitioners' argument ignores that Congress could have applied this law retroactively, but did not. The Petitioners offer no compelling reason why this Court should do what Congress declined to do.

However, even on its own terms, the Petitioners' argument is unconvincing. For, even if the presumption in favor of the state limitations periods could be overcome merely by demonstrating that the WARN Act possesses sufficient similarities to an existing federal scheme containing a limitations period, the fact remains that the "analogous" federal statute on which the Petitioners rely contains virtually no material similarities to the WARN Act.

As the Court of Appeals quite properly observed in this case, "[t]he primary purpose of the NLRA is to protect the right of workers to join together in labor organizations and collectively bargain for the terms and conditions of employment." *Crown Cork & Seal Co., Inc.*, 32 F.3d at 57 (3rd Cir. 1994), *citing United Paperworkers Int'l Union, Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51, 54 (2nd Cir. 1993). Thus, in its broadest possible terms, the purpose of the NLRA is to ensure an equitable collective bargaining process. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987). Yet, even at this broad level of abstraction, the purpose of the NLRA and the WARN Act do not intersect.

The WARN Act was created to provide:

> [T]he protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary to enter a skill

> training or retraining that will allow those workers to successfully compete in the job market.

20 C.F.R. § 639.1 (1994). To accomplish this goal, the WARN Act provides a single cause of action in damages for the injuries caused by an employer's failure to provide adequate notice of impending employment loss. *Specialty Paperboard, Inc.*, 999 F.2d at 55; *Finkler v. Elsinore Shore Associates*, 725 F. Supp. 828, 830 (D.N.J. 1989).

While the WARN Act confers on unions standing to sue on behalf of injured employees, the broader interests that the statute was designed to protect—providing employees, their families, and their communities with a period of time to prepare for the impending hardships associated with loss of employment—do not involve a union's role as collective bargaining representative. Indeed, the rights created by the WARN Act are, by its express terms, "in addition to" rights created under the federal labor laws. 29 U.S.C. § 2105. The WARN Act, therefore,

> provides protection to individual union and nonunion workers alike, and this neither encourage[s] nor discourage[s] the collective bargaining processes that are the subject of the NLRA.

*Fort Halifax Packing Co.*, 482 U.S. at 20-21.

The legislative history behind the enactment of the WARN Act clearly illustrates the sharp distinction which Congress intended to draw between the WARN Act and preexisting federal labor laws. Senator Metzenbaum, one of the principal sponsors of the WARN Act, stated:

> The rights and remedies set out in this bill are entitled to be separate from, and are not intended to supplant, limit or otherwise adversely affect, any other rights and remedies afforded employees or other persons by other statutes, such as the National Labor Relations Act, the Labor-Management Relations Act, the Employees Retirement Income Security Act, and

> the state plant closing laws that touch upon the subject of plant closings and mass layoffs. The Committee has not attempted to review the abovementioned federal laws, or the decisions interpreting those laws, and thus in reporting this bill, the Committee neither approves or disapproves of any such decisions.

S. Rep. No. 62, 100th Congress, 1st Sess. at 25. *Accord*, 134 Cong. Rec. 8611-12 (June 27, 1988).

Nor do WARN Act cases threaten to disrupt the formation or administration of collective bargaining agreements. The rights afforded individual workers under the WARN Act are independent of existing contractual relationships and cannot be modified by the parties:

> [T]he WARN requirements stand by themselves and cannot be set aside in favor of collective bargaining agreements, regardless of whether such agreements were entered into before or after the effective date of WARN.

54 Fed. Reg. 16,042, 16,044 (1989). The WARN Act does not affect union organizing, representation, collective bargaining, grievance dispute resolution, or any other aspect of labor-management relations. The statute involves only an employee's right to advance notice of imminent employment loss.

Perhaps the only point of congruence between the NLRA and the WARN Act is that both address the relationship of an employer and its employees. Yet even this statement is open to serious question. In actuality, the NLRA addresses the relationship between employers and employees while, in most situations, the WARN Act addresses the relationship between employers and their *former* employees.

This distinction is of considerable significance in light of the historical importance attached to the prompt and final resolution of ongoing labor disputes under the

NLRA. As Judge Wisdom perceptively observed in his dissenting opinion in *Halkias*:

> The reason for preferring rapid resolution of an ordinary labor dispute is that when the dispute is resolved, employees will go back to work, production will resume, the employer's sales will increase, and the positive effects of the business on the overall economy will return. Because strikes disrupt the status quo and hurt the economy, it is important to minimize the economic damage to the company and the community by ending them swiftly. Understandably, the NLRA sets a comparatively short limitations period (six months) as a means of achieving these goals.
>
> Those considerations, unfortunately, have no place in a scenario where WARN comes into play. When a WARN dispute is resolved, the plant stays closed. Employees fired en masse stay fired. Production does not resume. The economy does not return to the status quo ante.

*Halkias*, 31 F.3d at 244. An "analogy" between these two federal statutes simply cannot overcome the well recognized presumption in favor of the adoption of state statutes of limitations.

## II. APPLICATION OF A SIX-MONTH STATUTE WOULD FRUSTRATE THE PURPOSES OF THE WARN ACT

Congress intended the WARN Act to be a broad, remedial statute. *Solberg v. Inline Corp.*, 740 F. Supp. 680, 685 (D. Minn. 1990). Since the passage of the statute, thousands of workers have gained advance notice of their layoffs. As the first federal law requiring any notice of plant closings and mass layoffs, Congress took a significant step in providing protection to those about to lose their jobs. Reports issued by the Economic Policy Institute and the National Academy of Science, and cited

by members of Congress during debate on the bill,[4] all document the economic and psychological benefits of advance notice to workers who are displaced, and to the nation, by reducing the average duration of unemployment and lessening the public costs of such unemployment. For example, Representative Foglietta observed that:

> The highly respected Economic Policy Institute found that advance notice requirements would reduce the period of joblessness by almost 4 weeks, would save $400 million in unemployment insurance costs, and would provide $1.5 billion in earnings to displaced workers. The report also cited a number of current studies by the Office of Technology Assessment and the National Academy of Science that failed to find evidence of substantial harm to business.[5]

The General Accounting Office, which conducted a study of employer compliance with the WARN Act in 1993, further identified that the success of counseling and job training assistance is often related to how early notice is provided to workers. "Dislocated worker studies report that far more workers seek assistance when help is available before or at the time of job loss than when it is available only after the workers have lost their jobs or benefits." [6]

The position advanced by the Petitioners would, however, "frustrate or significantly interfere with" these important federal policies. This is because, based on the

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[4] 134 Cong. Rec. S8449-54 (June 23, 1988); 134 Cong. Rec. S8449-72 (June 23, 1988); 133 Cong. Rec. S9389-92 (July 8, 1987); 134 Cong. Rec. S4540-48 (April 22, 1988).

[5] 134 Cong. Rec. H5516 (July 13, 1988).

[6] *Dislocated Workers: Worker Adjustment and Retraining Notification Act (WARN) Not Meeting Its Goals*, GAO/HRD-93-18 (February 1993).

"practicalities of litigation" under the WARN Act, the six-month period proposed by the Petitioners would substantially undermine the interests the statute was designed to serve.

For example, the WARN Act's advance notice requirements are triggered by either one of two occurrences, a "plant closing" or a "mass layoff." 29 U.S.C. § 2101 (a). Since the passage of the statute, much of the WARN Act litigation has involved the Act's "mass layoff" provision. Under this provision, a WARN Act cause of action may arise only if a certain number of employees (500) or a certain percentage (one-third) of the overall work force are the subject of an "employment loss." 29 U.S.C. § 2101(a)(3)(B). The term "employment loss" is also defined in the Act to include either an outright termination, a layoff exceeding six months, or "a reduction in hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6).

Unless a WARN Act claim based on a "mass layoff" is deemed to accrue at the time that the layoff or work reduction has lasted more than six months, the six-month statute of limitations proposed by Petitioners would be completely incompatible with the WARN Act's remedial purposes since an action of this type requires six months in which to ripen into a cause of action. 29 U.S.C. § 2101(a)(6)(B).[7] *See generally Kildea v. Elector Wire Products, Inc.*, 775 F. Supp. 1014, 1019 (E.D. Mich.

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[7] It should also be noted that the six month statute of limitations proposed by the Petitioners would not be a full six months with respect to a WARN Act claim based on a "plant closing" either. A "plant closing" is defined in the Act as a permanent or temporary shutdown of a single site, if that shutdown results in an employment loss "during any 30-day period for 50 or more employees." 29 U.S.C. § 2101(a)(2). Thus, a permanent or temporary "plant closing" cannot give rise to a WARN Act claim until at least thirty days have elapsed.

1991); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1276, 1284 (E.D. Tenn. 1990).

Nor would a six-month limitations period be manageable in connection with a "mass layoff," even if the cause of action were deemed to accrue after the expiration of six months. In many cases employees are laid off on a staggered basis, in groups, weeks or months apart from each other. *See generally Kildea,* 775 F. Supp. 1014. Since the WARN Act requires a minimum number of employees and a minimum percentage of the workforce for a layoff to be defined as a "mass layoff" within the meaning of the Act, such a cause of action could not be said to accrue until the six months has run for all of the necessary number of adversely affected employees. *Cf., Auto. Mechanics Local 701 v. Santa Fe Term. Serv.*, 830 F. Supp. 432, 434-435 (N.D. Ill. 1993).

However, even assuming that the timing difficulties presented by the application of a six-month statute of limitations to a WARN Act claim could be remedied by an adjustment of the date that a cause of action accrues, the fact remains that the WARN Act itself creates a technical, highly complex threshold which must be met before a cause of action under the Act exists. *See generally Kildea,* 774 F. Supp. 1014. And, in light of the particular circumstances of the individuals who may be injured by a WARN Act violation, it is extremely doubtful that these complexities could be mastered within the six-month limitations period proposed by the Petitioners.

An individual with a viable WARN Act claim is in that position because he/she has lost a job in an unannounced mass layoff or plant closing. The first order of business for such an individual is not the undertaking of a lawsuit which promises limited and uncertain relief years in the future. Such an individual's primary concern in the weeks and months after the layoff or plant closing is securing a new job.

It is particularly with respect to non-union workers, lacking union counsel or readily available information about their rights, that the § 10(b) period would ultimately frustrate, rather than promote, the policies contained in the WARN Act. These concerns with the WARN Act's complexity and the difficulties presented by a short limitations period were admirably explained in Judge Wisdom's dissent:

> Non-unionized WARN plaintiffs are unlikely to have sufficient information to be able to bring suit within six months. Whereas unions are readily able to determine whether a sufficient number of their members have lost their jobs to invoke WARN's remedies, non-union employees must learn about the scope of a layoff by talking to co-workers and gradually compiling a list of those affected. This will be a time-consuming laborious undertaking.

*Halkias*, 31 F.3d at 245 (footnote omitted).[8]

This is especially so for seasonal workers, such as agricultural[9] and garment workers.[10] These workers are

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[8] In fact, Judge Wisdom recognized that: "The most severe aspect of the majority's holding is its decision to subject the non-unionized employees in this case to the strictures of the NLRA . . . [T]his truly baffles the laws of geometry." *Halkias*, 31 F.3d at 244.

[9] It is worth noting that the National Labor Relations Act expressly excludes agricultural workers. 29 U.S.C. § 152(3).

[10] In enacting WARN, Congress specifically addressed the issue of whether seasonal workers would be covered. One approach that would have excluded those who worked less than three months during the year was rejected. Ultimately, Congress determined that seasonal workers were entitled to the protection of the WARN Act unless they fit the definition of "part-time" workers in 29 U.S.C. § 2103(1). *Marques*, 867 F. Supp. 1438 (N.D. Cal. 1994) (holding WARN Act applies to seasonal workers employed as lettuce harvesters). *See also Solberg*, 740 F. Supp. at 685 (D. Minn. 1990) (the statutory definition of "part-time employees" includes those full-time workers who have been employed for fewer than six of the twelve months preceding the date notice is required).

typically unfamiliar with the legal system, uninformed as to their legal rights, and lack information concerning how to obtain legal representation. Generally these workers are not represented by unions. *See generally Marques v. Telles Ranch*, 867 F. Supp. 1438 (N.D. Cal. 1994). As documented in the Findings from the National Agricultural Workers Survey, many seasonal agricultural workers have low levels of education, do not speak or read English, and have incomes below the poverty level.[11] Since the only enforcement mechanism of the WARN Act is redress through the federal courts, dislocated workers carry a heavy burden to vindicate their rights.

In *DelCostello* this Court rejected the application of state statutes of limitations governing arbitration awards precisely because the short time periods provided in such statutes "fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under [federal law]." 462 U.S. at 166. In this case, it is the relatively short federal limitations period being advocated by the Petitioners which would deprive victims of WARN Act violations of a satisfactory opportunity to vindicate the rights which Congress has seen fit to provide.

Judge Wisdom's closing in his dissent in *Halkias* should be heeded:

> The plaintiffs, among countless others, have suffered the indignity of losing their employment without notice—in violation of federal law. In seeking the redress to which Congress has made them entitled, this Court has closed the gate on them one last time, on a legal principle so tenuous in foundation, it appears as but an academic exercise. Unfortunately for [the workers] and thousands of other workers similarly situated, it is anything but that.

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[11] Findings from the National Agricultural Workers Survey (NAWS): A Demographic and Employment Profile of Perishable Crop Farm Workers Executive Summary ii (1990).

> Because I believe that the Court's decision today promotes expediency and uniformity at the expense of the rights of workers, I dissent.

31 F.3d at 248.

## CONCLUSION

This Court should not deviate from its general rule which calls for applying an analogous state statute of limitations where Congress has not provided a specific limitations period. Application of the six-month statute of limitations in cases brought under the WARN Act would bring harsh results, and frustrate Congress' intent in enacting the WARN Act to ensure that workers obtain notice prior to employment loss, and to protect those who do not.

Respectfully submitted,

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